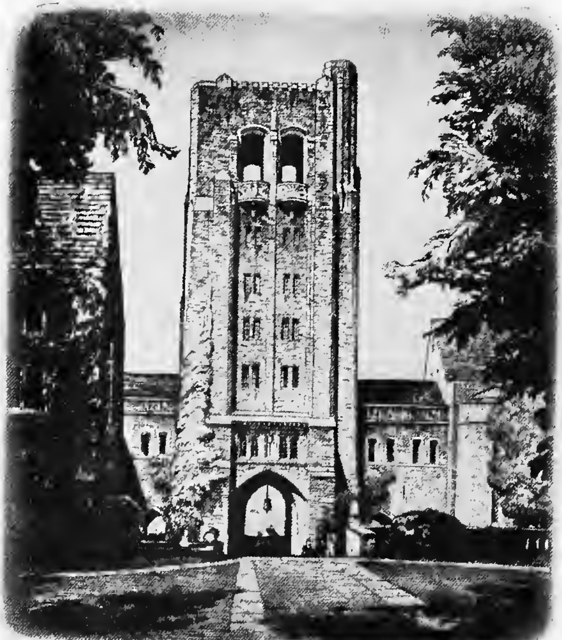
Business Competition and the Law

Gilbert H. Montague



Business Competition and the Law

Everyday Trade Conditions Affected by the Anti-Trust Laws

By

Gilbert Holland Montague

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PREFACE

THIS book deals wholly with practical questions. Professionally I have often threshed them out, in court with judges and against opposing counsel, in conferences with United States Attorneys and with the Federal Trade Commission, and in consultations with bewildered business men of various stations and degrees. No one realizes better than I what far-reaching consequences to economics, to sociology, to ethics, and to government these questions are bound to have. But this is not the book, nor have I now the leisure, to explore into these theoretical fields. To me these questions present themselves daily as spelling either success or failure for great merchandising organizations, for nation-wide sales campaigns, for carefully conceived and elaborately executed marketing plans, and for the network of hundreds of thousands of distributing channels that create national distribution among millions of consumers for scores of competing producers and manu-

facturers. It is the bearing of these questions upon the web and woof of everyday business—their significance to make or break the manufacturer or his competitor, and their consequences to large investments of capital and effort in these great organizations, campaigns, and plans for distribution—that supply the keynote of this book.

This, therefore, is a book for business men. Court decisions and legal proceedings comprise, indeed, its backbone; and lawyers and economic students will, I hope, find them all faithfully cited. But the articles that were the nucleus of these chapters were originally intended for business men; and in preparing these pages for the press, I have had in mind the same audience. Readers seeking exact references will find satisfaction, I trust, in the Bibliography and Authorities which I have appended.

The recent dates of these authorities, I might add, are not at all accidental. Business competition is a relatively new legal subject. Only recently has it been realized how comprehensively the Sherman Act has covered it. Meanwhile, before this was generally realized, the Sherman Act, in 1914, was supplemented by two other acts: the Clayton Act, which, besides prohibiting various

kinds of price discriminations and contractual arrangements, also increased to a degree still unappreciated the dangers to business men from the anti-trust laws; and the Federal Trade Commission Act, which vested the Commission not only with sweeping investigational powers and with authority to enforce the specific prohibitions just mentioned, but also charged the Commission with the duty of enforcing a general prohibition against all "unfair methods of competition" in interstate and in foreign commerce. So that, today, there converge on this subject, through Federal authority alone irrespective of any State anti-trust statutes, three anti-trust laws of sweeping application, supported by the entire resources of the Federal Trade Commission, the great powers of the Attorney-General, the Department of Justice, and the United States Attorneys in every judicial district in the country, and the vigorous and litigious inclinations of "aggrieved" individuals everywhere to whom three-fold damages with a counsel fee and relief from any debt arising out of any of these prohibited transactions may appear to be an object. The law of business competition, therefore, is really in its beginning. And if other phases of the Sherman Act afford

any criterion of judicial development, the law of business competition will prove, for a great many years to come, a constant school for humility to anyone who attempts now to dogmatize about it.

Acknowledgment is due to *Printers' Ink* for permission to use, as the nucleus of this book, a series of articles of mine which it published between September and December, 1915. Acknowledgment also is due to Mr. Roy W. Johnson, who materially assisted me in the preparation of those articles. Too frequently, I am aware, in the following pages, do unliterary style, colloquialism, business idiom and vernacular—not to say slang—betray the fact that this book has been written in moments that I have snatched from professional absorption in actual pressing problems of business competition and the law. Acknowledgment in advance, therefore, is due to all readers who may graciously forgive me these faults.

GILBERT HOLLAND MONTAGUE.

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CHAPTER I

DANGERS OF AGGRESSIVE SALESMANSHIP

AN insignificant and unobtrusive little manufacturer began to market a specialty through the retail trade in a limited territory. He had a small plant where he put up the goods, and he acted largely as his own sales force, selling direct to the smaller stores. From each dealer he secured a straight contract binding the dealer, among other things, to resell the goods at a specified price.

By degrees a local demand for the specialty began to manifest itself, and one of the big stores made inquiry. The manufacturer produced his contract, which the store declined to sign. "No

contract, no goods," said the manufacturer, whereupon the store filed a complaint in the office of the United States Attorney.

Let me emphasize the fact that, as regards the size of his business, this little fellow was utterly negligible. His annual gross business probably wouldn't have paid the cigar bill of any one of half a dozen concerns in the same field. To apply to him the epithets reserved for violators of the Federal anti-trust laws sounds like a huge joke. Yet the machinery designed for curbing predatory business, popularly known as "trust-busting," pulverized him quietly and expeditiously.

A month or two after his interview with the big-store buyer, the specialty man received a letter from the United States Attorney's office, the first paragraph of which was in effect a subpœna. He was practically directed to appear forthwith, and show cause why he should not be proceeded against as a conspirator in restraint of trade. He couldn't have been served with a more formidable document if he had been as big as the United States Steel Corporation.

His lawyer had a brief interview with the United States Attorney. The Government demanded the cancellation of those contracts; nothing else would

do; it wasn't a question of an equity suit for an injunction, but a Grand Jury proceeding under the criminal sections of the Sherman Act; the Government would summon every dealer who had signed the contract, as well as the big-store buyer who had been refused the goods; there would be no chance for the manufacturer to claim immunity if an indictment were found; no, it didn't make the slightest difference that this manufacturer happened to be small and insignificant.

The Grand Jury proceeding never took place. By advice of counsel, the manufacturer recalled his contracts, and several months later went into bankruptcy.

I have told the story of the specialty manufacturer at some length, because it illustrates very clearly a fact which must be understood at the outset; namely, that any concern which is doing business across a State line may at some time run foul of the anti-trust laws. No manufacturer or merchant can afford to be careless in his sales methods, or in his relations with customers or competitors, and assure himself that he will escape observation because he is inconspicuous. The duty of investigating alleged violations of one or another of the Federal anti-trust laws

now rests on both the Department of Justice and the Federal Trade Commission, and the latter body is even more accessible to complaints than the District Attorney's office. Most of the cases which have been threshed out in the courts have involved large concerns, but there have been hundreds of cases, like that of the little specialty man, which never reached the courts at all. Rather than go to all the expense of fighting a Government prosecution, many a concern has been obliged to change its selling methods in some particular to meet the demands of the Government. Probably few cases have resulted so disastrously as that cited above; but it is not an altogether pleasant experience to be reviewed by an agent of Uncle Sam with the shadow of the Grand Jury looming up behind him, and to be compelled to go to all the expense of a more or less complete reorganization. "Restraint of trade" is a pretty broad and comprehensive term, and it is a subject in which no business man can afford to plead lack of interest.

It is not my purpose to attack the law, nor to criticize the policy of the Government, nor to teach business men how to evade the law. My intention is simply to point out, from a considerable

study of the multitudinous court decisions in anti-trust cases, some of the acts which the Government regards as objectionable, and which are likely to be construed as evidence of an attempt to restrain trade. The vast majority of business men desire to obey the law, and are entitled to know the specific methods of getting business which are likely to be construed as a violation of the law. Business men, moreover, are entitled to know whether the competition to which they are being subjected by their rivals is legally justifiable.

IS THE GOVERNMENT "LETTING UP"?

One other point, before I go on to the discussion of conspiracy to restrain trade as interpreted by the courts. It has repeatedly been declared, since the recent decisions in the Cash Register, the Shoe Machinery, and the Steel Corporation cases, that the Government was "letting up" in its prosecutions of business concerns, that public opinion was running strongly against the vigorous enforcement of the Sherman and Clayton Acts, and that the courts were showing much greater leniency towards alleged offenders. After a careful study of the opinions rendered in these

recent cases and of the Government's contentions in indictments, petitions, and briefs in cases now pending, I see absolutely no warrant for such a conclusion—except in one particular. At present, the theory that mere size may make a concern an unlawful "trust," and the notion that because it controls a large percentage of the business in its field it is, *prima facie*, a trade restraint, seems to be losing credit in the courts. Whether the Government will succeed in its effort to revivify this notion and establish this theory in the Harvester case is a question now awaiting the determination of the Supreme Court. The courts refused to dissolve the United Shoe Machinery Company and the United States Steel Corporation, even though they were tremendously large and were pre-eminent in their respective fields. But the inquisition, both of the courts and of the Government, into the *methods* by which trade pre-eminence has been gained are as thoroughly relentless as ever. There is absolutely no indication to be found in any recorded case that the Government or the courts are disposed to relax their vigilance one iota as regards the *means by which trade is acquired*.

It may well be, as the newspapers tell us, that

the Government will refrain from inaugurating many new prosecutions until after the Harvester, the Shoe Machinery, the Steel Corporation, and some of the other anti-trust cases now pending in the Supreme Court are decided. Possibly some of the cases now in progress will be allowed to drag. But as long as the law is on the statute-books—and there is no present indication that it will not remain there—no business man should persuade himself that he need not respect it. His acts of today and tomorrow may be used twenty years hence as evidence of conspiracy, if some future Attorney-General shall choose to examine into them. The records in the Cash Register case show how the competitive acts of times long past may enmesh with dangerous consequences in the proof of a constructive conspiracy. The Government can probe the history of a business as far back as it likes in the search for a plan of action in the form of a conspiracy, and in order to convict it is only necessary to show that the conspiracy continued down to a date within three years prior to the indictment. Any security which is founded upon temporary non-enforcement of the law is the falsest kind of security.

WHAT CONSTITUTES A CONSPIRACY

The Sherman Act, of July 2, 1890, declares that combinations and conspiracies in restraint of trade and attempts to monopolize are unlawful. The Clayton Act, of October 15, 1914, singles out certain specific kinds of acts, such as price-discriminations and "tying-contracts," and declares them unlawful *when their effect is substantially to lessen competition or tend to create a monopoly.* Whether the Clayton Act really adds anything to the earlier statute is debatable. But this much is certain, that in any case the object of the law is to prevent restraint of trade by means of agreements or of aggressive acts of monopolizing tendency. The offence is the resulting or threatened restraint of trade, and *not* primarily the *separate acts* which may be alleged as proof that restraint of trade exists or is threatened.

It is important that the foregoing distinction be kept clearly in mind. It is perfectly proper, for example, to require one's salesmen to make reports concerning the sales of competing products in their territories. There is no law against such a procedure; in fact, it is common practice among business men generally. But that harmless and

almost necessary practice may react with deadly effect if, at the same time, the company is indulging in other practices which, when taken together, indicate a plan to restrict competition.

A case in point is the Turpentine case which came before the Supreme Court of the United States in 1913. This was a criminal suit under the Sherman Act, brought by the Government against certain officials of a turpentine company as individuals. The Government alleged threats of competitive acts as proof that a conspiracy to restrain trade and crush competition had been entered into. Some of the acts would have been plain violations of local laws. Among them were fraudulently grading, regrading, and raising grades of rosins and falsely gauging spirits of turpentine. Most of the acts threatened, however, considered in themselves and separately from each other and from the surrounding circumstances, would not have apparently violated any local laws; and these threats comprised the charges on which the Government chiefly relied in obtaining the conviction of these officials.

Included among these threatened acts were the following tactics of aggressive competition: Bidding down turpentine and rosin so that competitors

could sell them only at ruinous prices; causing naval-stores receipts that naturally would go to one port to go to another; purchasing thereafter a large part of the company's supplies at ports known as closed ports, with intent to depress the market; refraining from purchasing any appreciable supply at Savannah, the primary market in the United States for naval stores, where purchases would tend to strengthen prices, but instead taking the receipts at the closed ports named on a basis of the market at Savannah; coercing factors and brokers into contracts with the defendants for the storage and purchase of their receipts and refusing to purchase from factors and brokers unless such contracts were entered into; inducing consumers, by payments and threats of boycotts, to postpone dates of delivery of contract supplies, and thus enabling defendants to postpone purchasing, when to purchase would tend to strengthen the market; making tentative offers of large amounts of naval stores to depress the market; accepting contracts only for small amounts and purchasing when the market had been depressed by the offers; selling far below cost in order to compel competitors to meet prices ruinous to everybody; and

fixing the price of turpentine below the cost of production.

Probably none of these acts, in themselves and separately considered, would have violated any anti-trust law; and after the defendants had been convicted and sentenced, their counsel urged this point upon appeal in the Supreme Court of the United States. To this the court said:

"As to the suggestion that the matters alleged to have been contemplated would not have constituted an offence if they had been done, it is enough to say that some of them conceivably might have been adequate to accomplish the result, and that *the intent alleged would convert what on their face might be no more than ordinary acts of competition or the small dishonesties of trade into a conspiracy of wider scope.* . . . Of course, this fact calls for conscience and circumspection in prosecuting officers, lest by the unfounded charge of a wider purpose than the acts necessarily import they convert what at most would be small local offences into crimes under the statutes of the United States. But we cannot say . . . that no intent could convert the proposed conduct into such a crime" (italics added).

That acts which "on their face might be no more

than ordinary acts of competition," perhaps not even "small dishonesties of trade," may take on the character of a conspiracy in violation of the anti-trust laws, is now well settled. The Supreme Court emphatically stated this principle in 1905, in the Packers' case; again in 1908, in the Danbury Hatters' case; and again in 1912, in the Reading case.

Since acts which in themselves are innocent may, in the eye of the law, become links in the chain of a conspiracy in restraint of trade, it might appear that in case of doubt safety must lie in the direction of refusal to act. But refusal to act, and even mere inaction, is sometimes quite as dangerous as any affirmative act can be.

CONSPIRACY BY CONCERTED INACTION

Refusal to deal with some particular concern is, in itself, quite innocent. In the absence of contract, there is never any duty to enter into or to continue business relations with anybody. Yet the Danbury Hatters' case, and a long line of "boycotting" cases that preceded it, clearly demonstrated that when members of labour organizations, in pursuance of a common plan, refuse to

buy, or to work, or to enter into, or to continue any kind of business relation with some particular concern and such refusal affects interstate commerce, they violate the Sherman Act. And so the law remained until 1914, when it was changed by the Clayton Act which created a special exception for labour, and expressly relieved it from this rule.

But the general rule still applies, however, in every day competition of business men.

Take the case of the retailer who is harassed by the competition of mail order houses and the competition of concerns that sell to consumers through channels other than the regular retail channels. No form of competition is more vexatious to the retailer. Can he not refuse to buy from the manufacturer who thus supplies his most disliked competitor? Of course he can! But see what happens when he refuses to buy in pursuance of a common agreement entered into by a number of retailers not to buy from such a manufacturer. I quote from the decision of the Supreme Court of the United States in 1910, in which the court held that a retail lumber association which did just this thing had violated the anti-trust laws of the State of Mississippi:

"That any one of the persons engaged in the retail lumber business," said the Supreme Court, "might have made a fixed rule of conduct not to buy his stock from a producer or wholesaler who should sell to consumers in competition with himself, is plain. No law which would infringe his freedom of contract in that particular would stand. But when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed. . . .

"But the plaintiffs in error say that the action which they have taken is purely defensive, and that they cannot maintain themselves as independent dealers supplying the consumer if the producers or wholesalers from whom they buy may not be prevented from competing with them for the direct trade of the consumer.

"For the purpose of suppressing this com-

petition they have not stopped with an individual obligation to refrain from dealing with one who sells within his own circle, and thereby deprives him of a possible customer, but have agreed not to deal with any one who makes sales to consumers, which sales might have been made by any one of the seventy-seven independent members of the association. Thus they have stripped themselves of all freedom of contract in order to compel those against whom they have combined to elect between their combined trade and that of consumers. That such an agreement is one in restraint of trade is undeniable, whatever the motive or necessity which has induced the compact."

Four years later, the Supreme Court of the United States with equal emphasis laid down the same principle in a decision holding that another retail lumber dealers' association, whose members had concertedly refused to buy in pursuance of an arrangement substantially like that of the association above described, had violated the Sherman Act.

REFUSAL TO SELL AS AN ACT OF CONSPIRACY

The lesson of these decisions might appear to be that the danger of refusing to enter into or to

continue business relations consists wholly in concerted agreement in such refusal; and that if only each man made such refusal, without first having agreed with his fellows that they would all refuse together, he would be absolutely safe. But even in that direction danger is threatened by the long arm of coincidence. A refusal to sell, even, may, in certain coincidences, and under surrounding circumstances of a certain character, become evidence of a conspiracy in restraint of trade.

Take the case of the manufacturer who receives an order from a dealer whom he has every reason to believe will slaughter the price of his goods, and cut so deeply under the price at which other dealers are selling them that dealers everywhere will lose all incentive to push or even carry the goods. Can this manufacturer refuse to sell to the price cutter? Right to refuse to deal with one whom you do not want to do business with would seem to be part of your right to life, liberty, and the pursuit of happiness which has been popularly considered inalienable ever since the Declaration of Independence. Leaving out of account railroads and telephone companies and lighting companies and the entire class of public

utility businesses that enjoy special privileges from the community and are therefore held to special obligations to serve everybody, it would seem that the right to refuse to sell, for any reason or for no reason, must be the clearest, most obvious, and most universal right that the Constitution assures to a citizen. This right to refuse to sell to a "price-cutter" has, indeed, been sweepingly upheld recently by the District Court and the Circuit Court of Appeals in one of the federal circuits in the Cream of Wheat case. Yet, in full view of these decisions, we find in another federal circuit, in a suit by a "price-cutter" for threefold damages under the anti-trust laws against a grape juice manufacturer who refused to sell him grape juice, another federal judge laying down the law to the jury in these terms:

"Defendant has asked me to say to you that it has an unquestioned right to stop dealing with a jobber for reasons sufficient to itself, and it and any other manufacturer has an unquestioned right to deal with or stop dealing with any jobber of his product, and that where it distributed its product through jobbers, upon whose methods of business it is largely dependent for the sale or the distribution of his product, it has a right to

choose the jobbers through whom it will sell and distribute its product. Now all those statements are true. Defendant further asks me, however, to say that the reasons which influence the manufacturer in such cases to choose between jobbers or to stop dealing with a particular jobber are of no consequence. Ordinarily that is true. It is always true except under circumstances which I shall hereafter specify. . . .

"There is evidence that certain jobbers, actual and potential competitors of the plaintiff here in Baltimore in the sale of Welch's grape juice, complained to the defendant that plaintiff was cutting prices. Defendant then satisfied itself that plaintiff was in fact doing so. Subsequently it refused to fill an order it had from the plaintiff and has never since sold it any grape juice. It is further in evidence that the defendant then notified the jobbers who had complained of plaintiff's price cutting that defendant had cut it off of the list of defendant's distributors and would not thereafter sell it grape juice. There is further in evidence a circular letter of the defendant sent out to the trade in October, 1912, in which defendant stated they expected jobbers to maintain its resale prices, and that it would decline to sell to

those who did not. It is for you to say upon this whole evidence whether you are satisfied by a fair preponderance of the evidence that in point of fact there was an *understanding or combination among the defendant and the jobbers to whom it sold, or some of them, that Welch's grape juice was not to be resold by a jobber at a price below that fixed by the defendant for such resale and that any jobber who did so resell had broken the agreement and that the defendant would enforce the agreement and protect the others against any liability to appreciable damage from its breach by refusing to sell to any one who broke the agreement.* . . .

"If you shall find that there was a combination of the character described to which defendant was a party, and that its refusing to sell plaintiff any more grape juice was made in furtherance of the purpose of such combination, then your next inquiry would be as to what damage, if any, the plaintiff has shown that he has suffered from such acts of defendant" (italics added).

This illustrates very prettily the reasoning by which an act, or even inaction, that in itself may be absolutely innocent, can be caught in a chain of circumstances, and arrayed before the jury in connection with other facts, and made by

the plaintiff to appear to be the very cornerstone of a conspiracy in violation of the anti-trust laws. Nor does the fact that in the case above quoted from the jury after two trials returned a verdict for the defendant destroy the force of the illustration.

INTENT IS ALWAYS THE MAIN ISSUE

A conspiracy in restraint of trade, then, is a *plan* or *purpose* to accomplish certain things. The conspiracy itself, of course, is invisible and intangible, since it is wholly a state of mind; but its *means* and its *effects*, in the form of aggressive sales policies, can be readily detected. It is the duty of the courts to decide whether the tactics of aggressive salesmanship are really the means and effects of a conspiracy or of something else. This point can best be illustrated by quoting the words of a Federal District Judge in his charge to the jury, in 1914, in a damage suit brought under the Sherman Act against a powder company:

"You, in your consideration of the facts," said the Judge, "of course, will endeavour to ascertain whether they stand isolated or are steps in a general plan. If they are the former, that is, separate and disconnected, I think you

would have great difficulty in finding that they show such an attempt at monopolization as is necessary to maintain this suit. If, however, you find that they bear a relation to each other, and the facts satisfy you, in the manner that I have charged you, that they are part and parcel of a general plan, or steps in a deliberate purpose, the question then is: What is that plan or purpose? Such plan might be either legitimate or illegitimate. Was such a plan or purpose to merely protect the legitimate interests of the defendant in the trade, that is, was it for the purpose of protecting such part or all of the trade which it had acquired theretofore by legitimate means, or which, by reason of its capacity and ability to supply, it was reasonably entitled to in free and open competition; or was it to harass and oppress its competitors so that in the end, be it near or far removed, they would cease to be independent competitors and leave it master of the market? If you find that such protection, and not oppression, was the purpose and the use made of such steps or parts of a plan, then the defendant is not liable in damages simply because as an incident to the carrying out of that plan, a competitor was injured in his business or property."

This states the law about as definitely and comprehensively as it has ever been stated. It also indicates the tremendous importance which isolated acts of salesmanship may assume, when they are grouped together for consideration by a jury. Indeed, aggressive sales methods are the commonest form of evidence in anti-trust cases, and every manufacturer should scrutinize his sales policies with the greatest care. Fortunately the courts have pointed out certain kinds of competitive acts which are regarded as objectionable, and which will pretty certainly be construed as evidence of an intent to restrain trade unlawfully.

CHAPTER II

LETTERS THAT SPELL CONSPIRACY

EVERY business man writes letters. As a part of the regular daily routine, letters go out to customers and possible customers, to jobbers and dealers, and to the sales force: letters which quote prices, answer inquiries, seek information, settle disputes, declare policies. Instruction and encouragement are imparted to the selling organization by letter, and some form of "ginger-up" matter has come to be a regular institution in most concerns which do business over any considerable territory. The entire history of almost any business can be traced, step by step, and in the completest detail, by examination of its correspondence files and scrap-books.

More than that, the underlying *motives* of almost any business can be reconstructed by skilful piecing together of various specimens of its written and printed communications. The materials for

such a reconstruction are nearly always in existence, and the officials of the Department of Justice are adepts at the work. When a concern is complained against as being in violation of the antitrust laws, the first step is usually a conference in the office of the United States District Attorney, and the second is the official examination of the correspondence as far back as the Government cares to go. The District Attorney is refreshingly frank about it. He "requests" the privilege of ransacking your letter files and your scrap-books in order to determine whether or not you really intended an unlawful restraint of trade. He admits that you are perfectly at liberty to refuse, whereupon he will be obliged to go into court and commence proceedings which will authorize him to do it. Furthermore, your refusal will be construed as an admission that you have something to conceal, so that on the whole it is better to yield gracefully in the first place.

The emissary of the Government comes to your office, and spends as much time as he sees fit in going over the records of past correspondence. He takes copious notes, paying particular attention to form letters which have been mailed to the trade and to the bulletins containing instructions

for the sales force. Then he goes away, and perhaps the Attorney-General then prepares his bill of complaint. Later on, if the case comes to trial, a *subpœna duces tecum* can be relied upon to produce the original documents in court. The court may not agree with the Government as regards the motive behind the letters, but the significant fact remains that those very letters, which may have reposed in the files for years on end, are quite likely to prove one of the most important factors in the whole case.

Indeed, the results in so many important cases have hinged upon the interpretation which should be placed upon a group of letters—and sometimes upon a single letter—that it has been thought wise to emphasize this phase of the subject thus early in this discussion. As has been stated, every business man writes letters, and there are few business houses that do not at some time or other issue statements of policy to the trade or to their own organizations. In view of the activity of the Government, and the emphasis which has been placed upon communications of this nature in anti-trust suits, it is of the highest importance to avoid carelessness of phraseology in letters which are meant to define sales policies.

Let us examine the actual text of a few letters which have been reviewed by the courts, together with the judicial comment which they called forth. Even if they do not indicate any general rule by which such letters may be made absolutely safe—such a rule is impossible to frame under present conditions—they will at least show the process by which the court attempts to get at the ruling motive, which is the real point at issue.

A CIRCULAR LETTER DISSECTED

Under date of January 15, 1910, a watch-case company sent the following letter to one hundred and thirty-one jobbers in the United States:

"DEAR SIR: We inclose herewith our new price list which we are mailing to the retail trade today. These prices are subject to the usual catalogue discount and the case discount only.

"We also inclose memoranda of the prices at which Boss, Crescent, Planet, Crown, and Silveroid cases and Excelsior watches will be billed in future to our jobbers. These prices are net, subject to the cash discount only.

"These prices are confidential.

"For the best interests of our business we have

determined to sell our goods exclusively to jobbers whom we find voluntarily conforming to our wishes as to the disposition by them of such goods.

"We shall make all specific sales, except of Howard watches, without any restrictions whatever.

"Whether or not our wishes as hereinafter stated be complied with, we shall from time to time exercise our right to select the jobbers to whom we shall sell our goods, and we shall, irrespective of any past dealings, refuse to sell to those jobbers who, in our opinion, handle our goods in a manner detrimental to our interests, or whose dealings with us are in any other respect unsatisfactory.

"Our present wishes are as follows:

"First. Our goods bearing the following trade-marks, to wit: Boss, Crescent, Planet, Crown, Silveroid, and Excelsior, will be sold by us to our jobbers at fixed prices, subject to a cash discount, and we desire that sales of these goods by jobbers, whether to retailers or to jobbers, shall be without deviation at the prices fixed by us for sales to retailers, subject only to the cash discount.

"Second. Howard watches are sold only

under the terms of the license covering their sales.

"THIRD. On all our other goods we place no restrictions as to the prices at which they are to be sold by jobbers.

"FOURTH. And, further, we desire that the jobbers to whom we sell our goods bearing the following trade-marks, to wit: Howard, Boss, Crescent, Planet, Crown, Silveroid, and Excelsior, shall not deal in any watch-cases other than those manufactured by us.

"FIFTH. All advertisements of our goods will be subject to our approval."

Not such a very threatening or oppressive letter, it would seem! Probably a good many readers of these pages have written quite as vigorous expressions of their wishes. Yet see what the court said about it, in 1915, when the company was tried on a charge of conspiracy in restraint of trade:

"Officers or agents of the company followed up this circular by visits to the selected jobbers—although perhaps not to all of them—and assured them that the letter meant exactly what it said, and that the policy outlined therein would be rigorously carried out. And it was insisted upon

and was carried out. Some of the jobbers assented to the company's wishes, and with more or less reluctance gave up buying from other manufacturers, while the jobbers that refused to assent were cut off from the Keystone product altogether, unless they obtained it through surreptitious channels.

"We do not think it necessary to spend time over the foregoing circular. *We regard it, not as a request, but as a threat; and not as an empty threat, but as a real menace from a strong manufacturer.* The defendant company attempts to justify both the circular and its own conduct before and after the circular was issued, by the argument that the selected jobbers were its "exclusive agents," and therefore were properly burdened with any conditions to which they might agree. But the relation of principal and agent did not exist between the company and the jobbers. They were not agents, paid for their services by salary or commission, and owing a duty to report and account; they were merely customers of the defendant company, who bought its unpatented cases by a transaction of outright purchase, and thereby took a complete title to the cases and acquired an unrestricted right to sell.

And, moreover, it should be observed that they were already established customers, not only of the defendant company, but also of its competitors, and had already become trade outlets for every manufacturer of cases whose wares they had been accustomed to buy. Now, what the defendant company did was either to close these already existing and already utilized outlets, or to narrow them materially, so far as the cases of its competitors were concerned; and we think the proposition need not be discussed that this was *pro tanto* a direct and unlawful restraint of trade.

"And it is not sufficient to answer that these competitors appear to have withstood the attack with more or less success, and that their total trade did not always, or even often, diminish. Where or how they made up the loss that they must have sustained is not material; it is certain that they must have lost whatever trade they had previously enjoyed with those jobbers that yielded to the threat of the defendant's circular; and it seems clear, therefore, that in this degree, at least, there was an unlawful restraint of trade. In other words, if this section of the trade had not been taken away from the defendant's competitors, we may reasonably suppose that they would have

retained it; and this fact seems to be a final answer to much of the evidence, the tables and lists of varying scope and value that have been laid before us, and were offered to show that on the whole not much damage, if any, was done by the offending circular and the defendant's unlawful conduct" (italics added).

By this decision the company was absolved on practically all counts *except* with respect to the letter above quoted. In the final decree the court ordered:

"*Second:* The defendant corporation, its directors, officers, agents, and servants, as well as the individual defendants, and all other persons when acting for or in behalf of the defendant corporation, are therefore hereby enjoined jointly and severally as follows:

"(a) From carrying out in any manner or by any means whatsoever, the policy and system manifested in said letter, and in the other acts and declarations referred to."

HOW SURROUNDING CIRCUMSTANCES SHOW INTENT

Now note right here a point, which will be brought out again and again throughout this

discussion, that the court in its endeavour to discover the motive which prompted the letter asked at once, "What happened?" The actual text under discussion was mild enough, but when taken in conjunction with the acts which directly followed, it fell under condemnation. In the eyes of the court it was one thing to request jobbers to refrain from handling watch-cases of other makes, and quite another to see that they carried out the request under pain of being cut off from supplies of the company's watch-cases. Taking all of the circumstances together, the court decided that the *intent* of the letter was to prevent the leading jobbers of the country from selling competing goods. That, in itself, constituted an unlawful restraint of trade, though at practically all other points the company was exonerated. In other words, *the success of the company in carrying out its request* led the court to conclude that it was the result of a definite plan.

We shall see precisely the same line of reasoning applied in the Cream of Wheat case where the court arrived at quite the opposite conclusion because the surrounding circumstances were so different. The court in its opinion in that case

referred to certain letters which the Cream of Wheat Company had sent to wholesale dealers. The first letter is dated at Minneapolis, January 25, 1913, and reads:

"To our Customers:

"We hereby state our terms of sale, as follows:

"We sell only to exclusive wholesalers, our price being $4.10 per case, 36 packages, delivered f. o. b. cars at customer's city, terms 30 days net or 1 per cent. discount for cash ten days from date of invoice. We do not split cars delivering less than car-lots at car-lot prices where, for instance, our customer has one or more branch houses. We do not make drop shipments. In carload lots the price delivered is $3.95. We request all of our customers that they sell only to the retail trade at a price of $4.50 per case, with a discount of not more than one per cent. for cash. Where our customer buys in carload lots we request that he shall not divide this car with other jobbers, but retain the car entirely for his own exclusive use and resell only to his retail trade. We request that our customers shall not sell to any other wholesaler to whom we ourselves will not sell for reasons that seem satisfactory

to us and to the best interests of the trade at large.

"Yours truly,
"CREAM OF WHEAT CO."

A subsequent letter is dated March 13, 1915, and was addressed to the company's jobbers individually. It runs as follows:

"DEAR SIR:

"The Great Atlantic & Pacific Tea Company is selling Cream of Wheat to the consumer at twelve cents per package. As soon as we were informed of the fact we discontinued sales to them. They have announced that they propose to continue to sell Cream of Wheat at that price, and in order to do so, since they can no longer buy direct from this company, they will undoubtedly endeavour to secure their supplies directly and indirectly, through both the jobbing and the retail trade.

"Twelve cents per package is below the cost of every regular retail groceryman. If the Great Atlantic & Pacific Tea Company can continue sales at that price, at whatever temporary cost to themselves, they will destroy the Cream of Wheat trade of every legitimate retail dealer with whom they come in competition.

"Moreover, if they can succeed in destroying the trade of the legitimate retailer in one article, by this means, the process will inevitably be extended with other articles, to the eventual complete demoralization of the trade of the legitimate jobber as well as of the trade of the legitimate retailer.

"The destruction of trade rivals by quotations below cost, at whatever temporary loss to themselves, is precisely the kind of unfair competition that has been so strongly condemned by the courts and by public opinion, when practised by other large corporations.

"We are certain that you will not permit your organization to be a party to this attempt to undermine your own and your customer's trade, and we request, therefore, that you watch with unsual care your disposals of Cream of Wheat, in order that no quantity, at any price, shall reach, directly or indirectly, the Great Atlantic & Pacific Tea Company, to enable them to continue their present menace to the legitimate trade.

"Yours truly,

"CREAM OF WHEAT COMPANY,

"By F. W. CLIFFORD, TREAS."

Those were the letters upon which the plaintiff in the case chiefly relied to prove an attempt to restrain trade on the part of the Cream of Wheat Company. The court applied the same reasoning which was so effective in the case previously quoted, but arrived at a different conclusion. I quote now from its decision:

"The defendant also sent out circulars to the jobbing trade pointing out the 'cut-rate' practices of plaintiff, and asking the recipients to see to it 'that no quantity (of Cream of Wheat) at any price shall reach directly or indirectly the plaintiffs, to enable them to continue their present menace to the legitimate trade.'

"In result, the situation when suit was brought was that plaintiff could not make any money on Cream of Wheat sold at twelve cents, because it could not get carload rates: but no great success attended defendant's efforts to prevent jobbers selling to plaintiff—there were and are too many men quite willing to let the Atlantic & Pacific Co. lose some money, as long as they made a little."

In other words, the non-success of the proposal, and the absence of other aggravating circumstances, led the court to conclude that the result of the plan was not to restrain trade illegally. In

comparing the Cream of Wheat letters with those of the watch company, it must always be noted that the latter, *because of the surrounding and resulting circumstances*, was strongly condemned, while the former, *because of the surrounding and resulting circumstances*, escaped condemnation.

SUPREME COURT ANALYSIS OF AN "INFORMATION BLANK"

I come now to a form of communication which bears on its face no evidence whatever as to the purpose for which it was issued, and which to all appearances is merely a request for information. It is the form known as an "Official Report" which was issued by certain associations of retail lumber dealers that were ordered to be dissolved in a case which was finally decided by the Supreme Court of the United States. This is the case which was approvingly cited by the court in the watch case quoted above. The text of the so-called "Official Report" is as follows:

"OFFICIAL REPORT

"(Name of the Particular Association Circulating it).

"Statement to Members (with the Date).

"You are reminded that it is because you are members of our Association and have an interest in common with your fellow members in the information contained in this statement, that they communicate it to you; and that they communicate it to you in strictest confidence and with the understanding that you are to receive it and treat it in the same way.

"The following are reported as having solicited, quoted, or as having sold direct to the consumers:

"(Here follows a list of the names and addresses of various wholesale dealers).

"Members upon learning of any instance of persons soliciting, quoting, or selling direct to consumers, should at once report same, and in so doing should, if possible, supply the following information:

"The number and initials of car.

"The name of consumer to whom the car is consigned.

"The initials or name of shipper.

"The date of arrival of car.

"The place of delivery.

"The point of origin."

Now the importance which the Supreme Court attached to this particular document is evident

from the fact that the court specifically declared that "the decree entered, declaring the defendants named to be in a combination or conspiracy to restrict and restrain competition, *depends solely upon the method adopted and being used by the defendants in the distribution of the information contained in that same document*" (italics added). It is extremely interesting to follow the reasoning of the highest court in the land with respect to the above-quoted form letter, which on its face is entirely innocent of any evil intent. The court, as always, goes at once to the question of intent:

"The reading of the official report shows that it is intended to give confidential information to the members of the associations of the names of wholesalers reported as soliciting or selling directly to consumers, members upon learning of any such instances being called upon to promptly report the same, supplying detailed information as to the particulars of the transaction. When viewed in the light of the history of these associations and the conflict in which they were engaged to keep the retail trade to themselves and to prevent wholesalers from interfering with what they regarded as their rights in such trade, *there can be but one purpose in giving the information in this*

form to the members of the retail associations of the names of all wholesalers who by their attempt to invade the exclusive territory of the retailers, as they regard it, have been guilty of unfair competitive trade. These lists were quite commonly spoken of as blacklists, and when the attention of a retailer was brought to the name of a wholesaler who had acted in this wise, it was with the evident purpose that he should know of such conduct and act accordingly. *True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do, but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own.* Indeed this purpose is practically conceded in the brief of the learned counsel for the appellants:

"'It was and is conceded by defendants and the Court below found that the circulation of this information would have a natural tendency to cause retailers receiving these reports to withhold patronage from listed concerns. That was, of

course, the very object of the defendants in circulating them.'"

THE "NATURAL TENDENCY" ANALYSED

"In other words," the Supreme Court continues, "the circulation of such information among the hundreds of retailers as to the alleged delinquency of a wholesaler with one of their number had and was intended to have the natural effect of causing such retailers to withhold their patronage from the concern listed. . . .

"The circulation of these reports not only tends to directly restrain the freedom of commerce by preventing the listed [wholesale] dealers from entering into competition with retailers, as was held by the District Court, but it directly tends to prevent other retailers, who have no personal grievance against him and with whom he might trade, from so doing, they being deterred solely because of the influence of the report circulated among the members of the associations. In other words, the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations, who had reported a wrong to himself, which

grievance when brought to the attention of others it was hoped would deter them from dealing with the offending party. This practice takes the case out of those normal and usual agreements in aid of trade and commerce which may be found not to be within the act, and puts it within the prohibited class of undue and unreasonable restraints, such as was the particular subject of condemnation in Loewe *vs.* Lawlor [the so-called Danbury Hatters' case].

"The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. . . .

"A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. 'But,' as was said by Mr. Justice Lurton, speaking for the court in Grenada Lumber

Co. *vs.* Mississippi [already discussed] 'when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.'

"When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealings *under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders*, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress, and the District Court was right in so holding" (italics added).

I need only add that, in this Lumber association case, "the defendants were enjoined from combin-

ing, conspiring, or agreeing together to distribute and from distributing to members of the associations named or any other person or persons *any information showing soliciting, quotations, or sales and shipments of lumber and lumber products from manufacturers and wholesalers to consumers of or dealers in lumber, and from the preparation and distribution of the lists above described as the 'Official Report' or the use of a similar device*" (italics added).

DEMONSTRATING A "CONTINUING CONSPIRACY"

As already stated, the files, office records, and scrap-books containing the correspondence and instructions of bygone years are a fruitful source of evidence when the Government is on the trail of a conspiracy to restrain trade. No man, of course, can alter the record that is contained in those repositories, but he *can*—and by all means *should*—so regulate his present acts and communications that they cannot be connected with the possible careless phraseology of former years. In order to hold an individual or a concern liable for a conspiracy to restrain trade, the Government must show that the conspiracy *continued to exist* up to a period within three years prior to the filing

of the petition, or, in a criminal case, three years prior to the finding of the indictment. The Government can go back as far as it likes in its search for evidence of the existence of a conspiracy, but if there is a serious break in the continuity of the evidence before the beginning of the three-year period, and if no evidence is discovered which belongs *within* the three years, there is every reason to maintain that any past conspiracy which might have existed has long been abandoned. Therefore, it is essential to use vigilance in keeping all present activities well within legal bounds.

The record in another recent case is particularly significant as showing the importance which is attached to letters and sales bulletins, some of them quite venerable with antiquity, when they can be connected with other things which occurred in the more immediate past. After the Government had obtained judgment at the trial, the case was heard by the Circuit Court of Appeals, which reversed the judgment of the lower court and remanded the case for new trial. The Circuit Court of Appeals, however, laid great stress upon the various documents presented by the Government, and certain of the company's publications

for the guidance of the sales force. I cannot make my point clearer than by quoting from its decision. The first communication it cites was taken from a publication issued in 1892—*nineteen years before the present prosecution was begun!*

"In an issue of a publication of the company," said the court, "seemingly for distribution amongst its officers and agents, of date May 1, 1892, occur these statements:

"'If the opposition knew what is in store for them they would not waste any more time and money staying in the business. They are all beginning to realize that there is no hope for them.'

"'It is only a question of whether we propose to spend the money to keep down opposition. If we continue, it is absolutely certain no opposition company can stand against this company and its agents. If necessary, we will spend five times as much money as we have already done, in order to down opposition. If they really believe this, they will throw up the sponge and quit.'

"'We are receiving overtures to buy out opposition. We will not buy them out. We do not buy out; we knock out.'

"In an issue August 1, 1895, occurs this statement:

"'We are determined to absolutely control the cash register business.'

"And in an issue of date March 25, 1897, after setting forth the policy of the company of frankly informing a competitor of the purpose to drive him out of business, occurs this statement:

"'This, it is true, is what is called "securing a monopoly"; but we think there can be no possible economic or other objection to it. Cash registers are not a necessity of life. Any one who chooses can do business without them, thus contributing nothing to the "monopoly."' "

The court simply brushed aside the fact that throughout these years the entire business community believed—and the Government tacitly concurred—that the Sherman Act then had no application to manufacturing concerns, and the further fact that the defendants' business was protected by basic patents which constituted their competitors simple infringers doing business in violation of the defendants' patent rights.

TOO VIGOROUS PHRASEOLOGY CONDEMNED

Further on in its opinion the court said:

"In the publication of the company and in the communications between the officers and agents

having to do with competition, terms of warfare were not infrequently used, such as battle, fight, enemy, ammunition, shot, whipped, victory, and flags flying. During that time all the competitors named then in existence retired from the field."

Particularly important is the consideration given by the court to a letter upon which the defence chiefly relied as showing that the illegal conspiracy had been abandoned more than three years before the date of the indictment.

"We have shown," said the court, "that the Government's evidence tends to establish the continuance of the conspiracy almost up to the very beginning of the three years. Something happened shortly after the beginning of the three years calculated to terminate the conspiracy, which may account for nothing being done by the defendants in error within the three years indicating the continued existence of the conspiracy, and which, if it was the cause of its termination, involves its continuance into the three years. That was action on the part of James to call the National to account for its attitude towards and action against the American. . . .

"In the nature of things, some time must have been taken to prepare for the proceeding, and the

evidence disclosed that James caused affidavits to be taken of unfair acts towards the American by National agents as far back as in March, 1909. It is not unlikely that the National became aware of this contemplated proceeding, and knowledge of it was calculated to cause it to take steps to end all action against the American which could reasonably be complained of. And we find that on April 1, 1909, the plaintiff in error Pflum sent the following letter to all the district managers, to wit:

" 'To All District Managers:

" '. . . . In the various conventions I have attended, I found that some of the newer members in the districts are not thoroughly clear on the best way to handle sales made by other companies. Please see that every agent in your district thoroughly understands our position in the matter.

" 'You know what this policy is, but in brief will say that in no case will we permit any of our agents to misrepresent cash registers manufactured by other companies, neither will we permit any agent or person in our employ to induce any purchaser of a cash register made by any other company to break his contract and return the register to the manufacturer. With the

line of registers that our agents now have, they are able to show the superiority of Nationals over those of any other make and at lower prices.

" 'There has been no violation of our policies that I know of, but I give you this information because of the inquiries received from the newer men in the field.

" 'Please see that these instructions are carried out in every detail and that the new men are so instructed on entering the field.' "

The court read this letter entirely in the light of the possible motive supplied by James's "contemplated proceeding." The court said:

"There is room to claim that such is the only reasonable ground to account for this letter being written and sent out. If so, there is room to claim, further, that the conspiracy continued at least until then."

Here is a letter that embodies what is practically a direct order to the company's sales force to act in accordance with the law, and a plain disavowal of any intent to restrain trade. Nevertheless, the court, as usual, goes directly to the question of the motive which led to the framing of the letter. There was room to conclude, says the court in the elaborate passage above quoted,

that the letter *might* have been written because the company had heard of the threatened prosecution, and hoped thereby to escape a suit. That being *possible*, and the surrounding circumstances being what they were, the court was willing to let the jury put that construction upon it if it were so disposed.

CHAPTER III

GETTING YOUR COMPETITOR'S BUSINESS

In a previous chapter I endeavoured to point out convincingly the fact that no manufacturer or merchant doing an interstate business is so small or so inconspicuous as to be immune from possible prosecution under the anti-trust laws. His acts, and the acts of his salesmen and agents, may at any time be used as evidence of a conspiracy in restraint of trade, and the great resources of an important branch of the Federal Government may be behind the prosecution. There is no certainty, of course, that the Government will win its case in the courts. Some very important cases have been lost by the Government in the lower courts, and are now before the Supreme Court on appeal. But the Government enjoys one important advantage; it can defray its expenses out of the taxpayers' money, while the defendant is obliged to pay out of his own funds.

The defendant in a recent important case has announced that its defence has already cost more than $300,000, and the case is not yet terminated.

The almost unlimited resources of the Government, and the certainty that any individual defendant will be obliged to pay out large sums—perhaps seriously affecting its earnings, or threatening actual bankruptcy—have led a great many concerns which have fallen under suspicion to accept what are known as "consent decrees." That is to say, they go into court and formally "admit" the allegations of the Government. Thereupon a decree is entered which perpetually enjoins them from future acts of the sort which have been enumerated in the Government's complaint. Sometimes a defendant will "consent" to a decree because he knows that his case is weak, and the probabilities are that the Government will win in the courts. Very often, however, decrees are consented to solely because the defendant is unwilling or unable to stand the expense of a trial. And under the head of "expense" we must include three things: the actual money which is paid out of the concern's treasury, the loss of time and demoralization of the organization while the suit is pending, and last, but by no means

least, the injury to the good will of the business. The public impression that the business methods of a concern are so conspicuously bad that it is necessary for the Federal Government to suppress them may cost more in the end than all the other items put together.

Thus we see that in a good many cases—by far the majority, in fact—the Government is the arbiter and not the courts. It is the Government's view of what constitutes wrongful restraint of trade, and not the view of the courts, which really is important to the average business man. The courts are continually modifying the doctrine in decrees handed down in litigated cases; but unless a man is prepared to stand up and fight for the legitimacy of his business methods, cost what it may, he cannot afford to disregard the Government's theory as to what constitutes unlawful restraint of trade.

WHAT THE GOVERNMENT REGARDS AS UNLAWFUL

True, the Government has never furnished the business community with a list of all the competitive acts which it regards with suspicion, as indicating the existence of a conspiracy to crush competition. Such a list would be impossible

to compile in the first place, and in the second place it would simply represent an invitation to the wilful wrongdoer to invent some method of restraint which might not be enumerated. But in the consent decrees referred to above, one gets a pretty comprehensive view of the general contentions of the Government on this point. Indeed, it is possible to go even further than that, and supplement the consent decrees with the claims made by the Government in its bills of complaint in some of the cases which are still pending. It should be borne in mind, in connection with the discussion of the cases which follow, that the points raised represent merely the Government's partisan view of the matter; that the courts have not passed upon the merits of the specific instances alleged; and that, if and when the courts do pass upon them, a different conclusion may be reached. In other words, it is not absolutely certain that *all* of the competitive practices set forth in what follows are *unlawful;* but it is certain that *the Government now maintains that they are unlawful.*

The kind of acts which the Government regards as evidence of unlawful intent in this respect were set forth with considerable detail in the

petition, in 1913, in a suit which subsequently the Government voluntarily discontinued without any trial or court proceedings. Since it cannot be assumed that the Government could prove any of its contentions in this petition, and the suit was discontinued without further proceedings, I shall not give the name of the defendant. But the Government's notion of what constitutes wrongful tactics in general with competitors may nevertheless be gathered from the following allegations in its petition, in which I have substituted other names for the goods, brands, and places alleged.

"A campaign of fierce and unfair competition" the petition recites, "has been planned or consented to by the said officers of the defendant company and directed by its general manager through its sales managers and other confidential subordinates. A force of special men, sometimes called the 'flying squadron,' was employed, who were particularly instructed and directed, and they imparted to sales agents and salesmen said instructions and directions, to suppress and destroy the business of competitors and their dealers or agents. These special men were also sometimes called 'knockout' men, and were employed for the purpose of interfering with the negotiations and inducing the can-

cellation by customers of their contracts of sale with competitors. Said defendants also employed agents who were instructed and directed to spy upon the business of competitors and fraudulently obtain information as to their sales and shipments, the addresses of their customers or prospective customers, and to report such information to the proper officers and managers of the defendant company at its offices, where it was used to discourage prospective purchasers and to induce the rescinding by customers of contracts of sales with competitors, and otherwise to interfere with the business of competitors. . . .

"They instructed agents of the defendant company how to manipulate competing [machines] for the purpose of showing alleged defects therein and of discouraging prospective purchasers or users of said devices and inducing them to rescind their contracts of purchase.

"They instructed agents of the defendant company to procure information from the employees of railroads, express companies, hotel companies, and others as to the plans and purposes of competitors and the shipment of their products and to report such information to the proper officers and managers of defendant company at its offices

where it was used in obstructing and suppressing the business of competitors. . . .

"Said agents have been directed, advised, and instructed by the defendants, who are directors, officers, and managers of the defendant company, to pursue in other ways the work of extermination against all competitors, and have been threatened with dismissal for permitting competition to exist in their district; and by letters, circulars, communications, and by other means they have carried out the plans and purposes of the defendant company and its directors and administrative officers to suppress competition and secure for it a monopoly of the [machine] business. . . .

"The defendants, who are directors and administrative officers of the defendant company, have studiously copied and simulated the advantageous features of competitors' manufactured products, and embodied and attached said features to the [Smith machine] and have advised the public, by correspondence and advertisement, that they were adopting and attaching such advantageous features to the [machines] manufactured and marketed by the defendant company. . . .

"Said directors and administrative officers, from time to time during the period aforesaid,

have built [machines] to resemble in a general way the appearance of competing [machines] and purporting to produce the same results and to perform the same functions. These were not built or offered for sale in good faith, but were for the sole purpose of 'knocking out' competition. Said [machines] were sold without regard to their cost of manufacture, and at such a figure as would ruin and destroy competitors. These devices were generally known as 'knockers' and were used solely for the purpose of destroying the business of such competitor. . . .

"Said directors and administrative officers also, from time to time, have maintained at the factory at [Metropolis, Missouri], a display room known as the 'Graveyard.' In this room were shown account registers of competing companies. Display cards and pictures showing the names of competing companies and nature of product manufactured by them were made and exhibited in said room, and pictures representing large piles of competitors' devices being burned as useless were also distributed throughout the trade. Said exhibits were pointed to as a warning to competitors, their dealers and agents, and to other persons who contemplated manufacturing,

selling, or using [machines] that competition would eventually be suppressed, and that the 'Graveyard' or bonfire would be the destination of competitors."

WHAT THE COURTS HAVE ENJOINED

The fact that in several suits where somewhat similar charges have been made the accused concerns have consented to decrees enjoining the practices charged by the Government against them has undoubtedly given these consent decrees something of the authority of a code of business competition.

A fairly comprehensive outline of the anti-trust law in respect of salesmanship was thus framed by the Government, assented to by defendants, and confirmed by the court, in the Adding Machine decree entered in 1913. Just how closely the defendant company should supervise the relations of its salesmen with competitors, and with the buyers of competing products, is here set forth in considerable detail.

The decree directs the company "with all convenient speed to issue and deliver instructions in writing to all its servants and agents engaged in the sale of its products, now or hereafter employed by

it, to absolutely desist and refrain from interfering with or directing, or permitting others under their control, or under the control of either of them, to unlawfully interfere with the business, machines, or appliances of competitors engaged in the manufacture, sale, and shipment, or in the sale or shipment in interstate and foreign commerce of adding-machines or appliances, by inducing or trying to induce such purchasers to cancel their contracts with competitors and to return to such competitors the adding machines or appliances so purchased, or by wrongfully obtaining information respecting the business, sales, or shipments of such competitors, or by fraudulent or illegal means inducing the employees of said competitors to give them such information, or permitting agents or employees of the defendant company or of either of the individual defendants to seek or to induce others to seek employment of said competitors for the purpose and with the intent thereby of wrongfully securing information as to the business of said competitors, or by any other method specified in said subdivision 'e' of the IV paragraph of the petition."

Examination of the subdivision of the petition cited shows that besides the particular "methods"

above enjoined, the following must be added: (1) instructing salesmen "how to manipulate competitors' machines for the purpose of showing alleged defects therein and dissatisfying competitors' 'users' or 'prospects' therewith"; (2) issuing "statements reflecting on competitors, for the purpose of injuring their business"; (3) supplying "agents with parts or illustrations misrepresenting the mechanism being sold by competitors, for the purpose of deceiving 'prospects' or 'users' of said competitors"; (4) instructing "agents to secure the names and addresses of 'users,' of competitors, and lists showing the location and description of competitors' machines on trial, for the purpose of interfering with the business of said competitors, and to enable the defendant company, with its enormous resources, to 'outmatch' the 'trials' of competitors;" and (5) adopting the "policy of advertising for sale, at reduced prices, competitors' machines which defendant company had traded out or otherwise secured, for the purpose of preventing sales by said competitors."

As stated in the previous chapter, dealing with the subject of letters to the trade, the question which the courts always ask is: What was the

intent? What was the purpose which these acts were meant to effect? Just so does the Government regard the relations of a concern with its competitors. Any sales tactics or policies which appear to have been undertaken for the purpose of discouraging competitors, or injuring the reputation of competitors' goods, or preventing the sale of such gocds by any indirection, are almost sure to fall under the Government's ban. Was the motive primarily to sell your own goods, or to prevent your competitor from selling his? is the question.

Take, for example, the consent decree that settled all the Government anti-trust litigation in the so-called Cash Register cases. The charges here were not unlike those in the two cases last above referred to. But after the conviction of the company's officers in the criminal suit had been reversed by the Circuit Court of Appeals, the Government and the company, in 1916, came together to frame the decree that concluded both the civil and criminal prosecutions. None of the defendants admitted ever having committed any of the acts which the decree agreed upon finally enjoined. Most of the acts enjoined were things which, as the Government conceded

and the decree expressly provided, were unlawful only when committed with the specific intent which the decree carefully particularized and specifically denounced.

A GOVERNMENT CODE OF SALESMANSHIP

After forbidding such obvious improprieties as trying to induce purchasers of competitive cash registers to break contracts, espionage upon competitors' employees and dealers, and obtaining secrets from competitors' employees and dealers —none of which the defendants admitted—the Cash Register decree enjoined the defendants "(d) from inducing" competitors' employees and dealers "to leave the service of such competitor or to cease to deal in such competitor's cash registers. . . . (f) from . . . offering for sale any cash register . . . made to resemble in appearance a competing register . . . or when . . . offered for sale not in good faith for the purpose of earning profits therefrom but for the dominant purpose of preventing sales of such competing cash registers . . . or of inducing the purchaser . . . of the competing cash register . . . to substitute therefor one of such similar machines, or . . . for the

purpose of driving from business . . . the manufacturer of or dealer in such competing cash registers. . . . (g) from selling . . . any cash register . . . manufactured by a competitor, whether acquired by purchase, exchange, or otherwise, not for the purpose of realizing therefrom as much as practicable, but for the dominant purpose or intent of preventing sales by a competitor or retail dealer in the cash registers. . . . (h) from selling or otherwise disposing of any second-hand cash register . . . of the defendant's own make for the purpose not of realizing therefrom as much as practicable but for the dominant purpose of underselling a competitor and driving him from business: provided, that nothing herein contained shall prevent any sale or offer at a price made in good faith to meet competition; (i) from employing any person, whether known as a 'special man,' or 'competition man,' . . . to have as his principal business not the promotion of the sale of the cash registers . . . of the make of the defendants, or the solicitation of orders therefor, but the prevention of sales of cash registers . . . by a competitor. . . . (j) from following from one city or village to another . . . any competitor . . . or any dealer in a competitive cash register

. . . for the purpose of interfering with or hindering such competitor . . . or dealer, while attempting to sell any cash register or other . . . or for the purpose of ascertaining the names of the persons upon whom, or the places of business at which, such competitor . . . or dealer, may call; (k) from making, or circulating . . . any statement . . . or insinuation reflecting upon the solvency or responsibility, financially or otherwise, of any competitor, or upon the efficiency of any competing cash register . . . when such statement . . . or insinuation is either a misrepresentation or is made for the mere purpose, not of directly promoting the sale of registers . . . manufactured by defendants, but of preventing the sale of competing cash registers . . . or of driving such competitor from business; (l) from using or publishing . . . any . . . circular, or letter, the purpose or intent of which is to recommend or suggest to agents or employees of the defendants the doing of any act herein forbidden. . . . (m) from intimidating . . . any competitor or any person contemplating becoming a competitor in the manufacture or sale of cash registers . . . by maintaining . . . a display of models of machines of the defendants' make, together with

various rival machines which they were built to resemble or to displace, or by maintaining . . . a display of quantities of second-hand registers . . . of a competitor, or by displaying placards or statements purporting to show the amounts lost by various competitors in an effort to compete with the defendant corporation . . . and from intimidating . . . by any such means, investors or persons contemplating becoming investors in the stocks or other securities of competing companies. . . . (n) from maintaining as an ostensible competitor any . . . organization owned, directed, or controlled, by stock ownership or otherwise, by said defendants or any of them or affiliated with them, or any of them without disclosing the connection with the said defendants; (o) from intimidating . . . prospective purchasers of competing cash registers . . . with suit or liability for patent infringement unless and until such claim of infringement has been sustained by a court of competent jurisdiction. But nothing herein contained shall prevent defendant corporation or its proper representative from serving in good faith upon any such purchaser a formal notice of its claim of infringement."

DANGEROUS RELATIONS WITH COMPETITORS' CUSTOMERS

One of the most drastic injunctions affecting relations with competitors' customers is contained in the consent decree obtained by the Government, in 1912, against certain concerns engaged in distributing news and stereotyped plates. By this decree the defendants were enjoined "from sending out travelling men *for the purpose or with instructions to influence the customers of such competitors of either of these defendants*, so as to secure the trade of such customers, without regard to the price" (italics added).

Interference with existing contracts between a competitor and its customers is, of course, always a wrong for which the competitor may sue the interfering party; and in several suits brought under the anti-trust act the courts have specifically enjoined such interference. The decree last quoted, however, goes to an extraordinary length upon this point and particularly enjoins some of the defendants "from in any manner promising or intimating to any publisher or other person who is a customer of the American Press Association, or any other competitor, that they will protect

such customer against expenses and costs in any suit that may arise by reason of the repudiation of any contract between such competitor and such customer"; "from in any manner retaining or permitting the retention by their agents or employees of plate metal or other property belonging to the American Press Association, or other competitor of said defendants"; "from in any manner offering bonuses of paper or plate service, free or at a nominal price, with the purpose and intent of inducing or enabling customers of the Western Newspaper Union or any other competitor to temporarily change to home print papers and thus to assist them in breaking contracts with the said Western Newspaper Union with lessened chances of liability for breach of contract; and furthermore from offering in connection with such bonus to sell their service at less than the usual price to such customer of such competitor, and from offering as a part of such plan the continued use of free plate for the home print side of the papers of such customer."

Salesmen, generally, have come to realize that disparagement of their competitors is not the most effective sales argument to use with customers. In some lines, however, where the customer buys

not merely merchandise but also some sort of continued service, the ability of the competitor to continue to give such service is almost an essential feature in the sales argument.

This consent decree above quoted goes to great lengths upon this point, and particularly enjoins some of the defendants "from in any manner, either directly or indirectly, instructing, causing, or permitting their agents or employees or travelling salesmen throughout the country to circulate reports or to intimate or convey the impression that these defendants will put the American Press Association out of business, or that the American Press Association will not be able to continue in business against the competition of these defendants, or that the American Press Association intends to or is about to combine with the defendants or the defendants with them, or to intimate or convey the impression that unless publishers approached by such salesmen deal with these defendants, they will be discriminated against as soon as the American Press Association shall be put out of business by the competition to which it is being subjected"; "from in any manner unfairly criticizing and abusing the method of the said American Press Association with reference

to advertising, or from doing any of said things through its weekly house-organs, known as the 'Publishers' Auxiliary' and the 'Western Publisher,' and particularly from misrepresenting through said means the business and business methods of the American Press Association, with the intent and for the purpose of taking away the customers of the said American Press Association, or otherwise injuring its business"; "from in any manner unfairly criticizing and abusing the method of the said Western Newspaper Union with reference to advertising through these defendants' circulars relating to its bureau of foreign advertising, or from doing any of said things through its weekly house-organ, known as the 'American Press,' and particularly from misrepresenting through said means the business and business methods of the Western Newspaper Union, with the intent and for the purpose of taking away the customers of the said Western Newspaper Union or otherwise injuring its business."

THREATS OF NEW COMPETITION ENJOINED

The Government looks with extreme disfavour upon threats or suggestions that new competition may be started under given conditions. Thus,

in this same decree, all of the defendants were enjoined "from threatening any customer of a competitor with starting a competing plant unless he patronizes one or the other of these defendants"; and "from threatening the competitors of either of these defendants that they must either cease competing with defendants or sell out to one or the other of the defendants herein, and from threatening that unless they do their industries will be destroyed by the establishment of nearby plants to actively compete with them, or by any other method of unfair competition."

Alleged threats to start new competition were also cited with condemnation by the Government, in 1913, in a suit against a glucose manufacturer. This suit is now pending on appeal, so that it cannot now be assumed that any of the Government's allegations have been finally established. But among the acts disapprovingly cited by the Government against the company—which the District Court has ordered to be dissolved—are alleged statements of its officers to various candy manufacturers throughout the country that "it expected them to purchase a certain large percentage of the glucose needed by them" from the company, and that "if said company did not get a

sufficient percentage of such glucose business, it would go into the candy manufacture itself in competition with such manufacturers."

Anything that looks like an attempt to shut out competitors' goods by persuading any class of professional advisers to refrain from specifying them is likely to be regarded very seriously by the Government. Thus in the Government's petition, in 1913, in a case against a stone-cutting concern, the company is accused of "inducing architects to specify for use in construction stone of such designation as can be supplied only by the defendant . . . when other competitors are producing stone of the same or like character, and inducing architects to bring their influence to bear in its behalf upon contractors or those intending to have construction work done, while professing to act disinterestedly and for the sole benefit of such party."

The case against the stone company has not been brought to trial, so here again we are quoting the Government's partisan view of the matter. It clearly indicates, however, that the Department of Justice is prepared to investigate every possible factor of distribution, and that even the professional advice of an architect to his client

may sometimes be relied upon as evidence of an intent to restrain competition.

Enough has been cited to show the extreme danger of too aggressive methods of dealing with competitors. Parenthetically it may be remarked that there is almost equal danger in too harmonious relations with one's competitors—but that must be left for later discussion. The intent is the point at issue, and as I have already pointed out, the Government can ransack letter files and office records and scrap-books for the purpose of finding out what the intent really is. Therefore, the business man must avoid even the appearance of unlawful intent. Competitors' prices may be met, new brands may be produced to parallel competitors' brands—but the emphasis must be placed on selling one's own goods, and not on preventing the sale by others of their goods. Letters, bulletins, advertisements, even word-of-mouth instructions to the sales force, must be framed with that point in mind. If the Government's attitude on the question of one's relations with his competitors could be summed up in a single sentence, it might run something like this: "Safety lies in minding your own business; and the man who begins to mind his competitors' business is inviting trouble."

CHAPTER IV

PRICE-DISCRIMINATIONS AND PRICE-MANIPULATION

HONEST manufacturers who have read with some trepidation of the activities of the Department of Justice and the Federal Trade Commission are asking: "How am I going to be sure that I am not unwittingly violating the law? I have several hundred salesmen scattered over the country who cannot be at all times under my personal supervision. Competition is very keen in my field. I have read the Sherman and Clayton Acts with great care, and also the Federal Trade Commission Act, but I seem to be more perplexed than ever. I don't want to violate the law. I want to know how far I can go, and how far my competitors can go. How can I find out?"

Well, it happens that in more than one instance the courts have tried, with some diffidence, to answer that very question. For example, in 1915, in the Watch-case suit the court asks:

"What are the ordinary marks of such a course of conduct as may properly be condemned as a restraint of trade?" Then the court proceeds to give its own answer, in the following words: "Without attempting to enumerate them exhaustively, a few general observations may be made. Trade is restrained by putting hindrances in the way of the persons that conduct it. Whatever makes it more difficult for such persons to carry on their business restrains them, and restrains their trade; but (to speak generally) as every successful effort of a merchant to increase his own trade makes it harder for his rivals to succeed and therefore restrains their trade; and as Congress certainly did not intend to condemn the proper exercise of business zeal and energy, we must recur to the rule of reason and ask—not merely what is restraint of trade, but what is unreasonable restraint of trade?

"On this subject we are certainly able to say some things with confidence. Competitors must not be oppressed or coerced; fraudulent or unfair or oppressive rivalry must not be pursued. And if these words are criticized as too general, we may reply that such generality is apparently unavoidable as some recent legislation of Congress

testifies, and moreover we may safely deny that the words are too vague for satisfactory use; for it must be remembered, that *the common agreement of moral opinion in the community furnishes an adequate guide* to their practical meaning and their practical application" (italics added).

On the other hand, in 1912, in the early stages of the Cash Register case, the defendants demurred on the ground that the indefiniteness of the law left no rule which business men might follow. The court's answer was a rebuke. "It is hard," said the court, "to sympathize with the often-repeated expression that a merchant is not advised by the anti-trust act of the character of a contemplated act. . . . The Golden Rule may not as yet be the standard by which the law requires contracts in restraint of trade to be measured, but the ancient adage, 'Live and let live,' has its application to trade and is a safe rule to go by." Yet this selfsame judge was later unanimously reversed by the Circuit Court of Appeals for incorrectly interpreting this same anti-trust act upon the trial of this very case!

It is not likely that these judicial pronouncements will prove very consoling, but they, with numerous others of even less luminosity, are the

best general rules available from authoritative sources.

There is no wonder, indeed, that business men, when confronted with the wide scope of the laws against restraint of trade and the apparently endless variety of acts which the Government objects to, are inclined to throw up their hands and exclaim: "In heaven's name, what *can* we do?" We shall find as we go on with our discussion, however, that the affirmative side of the question has often been regarded by the courts, and that, in certain instances, definite rulings have been laid down as to conduct which is *lawful*. And in the end we may be able to draw some general conclusions which will be positively helpful.

AN EXPOSITION OF LAWFUL PRACTICE

One of those affirmative pronouncements occurred, in 1914, in the charge to the jury by the judge in a case against a powder company. This was an action brought under Section 7 of the Sherman Act, to recover $3,859,873.46 in damages. It was alleged that the defendant, under an old combination which had been dissolved, had established a scale of discriminatory prices in territory served by the plaintiff for the purpose of

unlawfully monopolizing the trade in powder. The latter company sued for three-fold damages, as the law provides. The case was tried before a jury, and lasted from September, 1913, until February 25, 1914. On the latter date the jury returned a verdict for the defendants. The judge's charge to the jury is a pretty comprehensive exposition of a manufacturer's lawful rights in the matter of meeting price competition, and is worthy of careful study.

"As to the alleged cut prices to remove trade from regular competition," says the judge, "the defendant having become possessed of the plants of other companies, was by reason of such purchases in a position to supply a larger demand of the powder trade than before. It had a right to take any usual method known in business conducted normally to preserve all the trade which these different companies brought to it. It had a right to run its mills at any capacity it saw fit, even though the running of such mills at their fullest capacity would require it to find additional markets. It had a right to do all these things even though it knew that in so doing keener competition for the trade would result. In competing for such trade, however, it was confined to the use of lawful methods of business. If by reason of its size or

its superior facilities, it could manufacture its product cheaper than a competitor, it had the right to avail itself of such advantage, either by taking the extra profits that such advantage gave or to underbid its competitors with their own trade. It would have no right, however, to keep such of its trade as had been acquired by illegal means from being openly and fairly competed for. It would have no right to use its superior advantages, whether derived through a number of plants or old contracts, in an attempt to monopolize the trade; and it would not have the right under the guise of ordinary methods in business to designedly underbid a competitor with the purpose of so crippling it as to force it out of business, or to make it a negligible factor in opposing a purpose to monopolize. The crucial question of the defendant's conduct in this central district in which the plaintiff was located is, therefore: What was the defendant's purpose in using the methods to secure the trade in that district? *Was it merely to protect its interests as a producer and vendor of powder, or was it to inflict such injury upon the Buckeye or other competitors in that district as to make it impossible for such competitors to cope with it there, because of their lesser financial strength and more*

limited area in which they could do a profitable business; so that in the end, be it soon or long deferred, they would have to yield their independence or withdraw their opposition as competitors, and permit the defendant's acquiring such a dominancy in the trade as to amount to monopoly?" (italics added).

After outlining trade conditions in the territory under consideration, the judge continues:

"That competition carried on by such a number [of concerns], striving with more or less zeal to obtain trade in the central States, would, in the absence of artificial restrictions, be more or less keen and troublesome must be assumed, and in dealing with the question whether the defendant, in inaugurating or using the methods employed by it to secure trade in that territory, was acting on the defensive and simply endeavouring to protect its legitimate interests, such competition must be considered; but in so doing, it must not be forgotten that during this time, or the greater part of it, it had the greater part of the trade which it obtained through the contracts mentioned in the Rice list and which, you will remember, came into existence while the trade association lasted, and which were then unlawful, because undue restraints of trade; so that, *if in the competi-*

tive struggle, whether it was of its own initiative or forced upon it by its competitors, its endeavour was to add to the trade thus secured to itself, that by this larger amount of trade thus removed from open competition its competitors in the territory containing such restricted market would be unable to get sufficient trade to carry on a profitable business, thus minimizing or removing them as competitors in that territory, such endeavours constitute attempts to monopolize.

"In addition to this, the making of this ninety-five-cent rate, general or special as applied to the central States, is to be considered in the light of the fact that the defendant was a large producer, having plants located in different parts of the country, the normal markets of which being within such area of its different plants as could readily be reached by them respectively. Such a trader has an advantage over a competitor who has but one location, as the former can recoup its losses, if any, in any particular district, or can add to a low amount of profit in such a district from the profits, if any result, from its operation in other districts.

GETTING BACK TO THE INTENT

"Intent, therefore, in the making of such ninety-five-cent rate, as already noted in the instance of

other steps, is the crucial matter. Intent, of course, is an act of the mind, and where the person having the mind in which an intent is formed fails to disclose it by words, we may turn to his acts, and if they furnish the evidence of intent, we may accept such conduct as evidence of the intent. If the remarks attributed to Mr. Haskell and Mr. Bumstead by Mr. Brewster, which are that Mr. Haskell said that the competitors could not make powder at a profit at ninety-five cents and that Mr. Bumstead said that such price was low enough to get the competitive black powder business, are true, they would be rather significant as to the purpose of making that ninety-five-cent rate, for you will remember that such remarks were said to have been made by both these men after that rate had been determined upon and which, as you will recollect, is said to have followed the making of the Brewster report, and which report contained the names of alleged customers of the plaintiff. . . .

"You in your consideration of the facts, of course, will endeavour to ascertain *whether they stand isolated or are steps in a general plan.* If they are the former, that is, separate and disconnected, I think you would have great difficulty in finding

that they show such an attempt at monopolization as is necessary to maintain this suit. *If, however, you find that they bear a relation to each other*, and the facts satisfy you, in the manner that I have charged you, that they are part and parcel of a general plan, or steps in a deliberate purpose, *the question then is: What is that plan or purpose?* Such plan might be either legitimate or illegitimate. *Was such a plan or purpose to merely protect the legitimate interests of the defendant in the trade, that is, was it for the purpose of protecting such part or all of the trade which it had acquired theretofore by legitimate means, or which, by reason of its capacity and ability to supply, it was reasonably entitled to in free competition; or was it to harass and oppress its competitors so that in the end, be it near or far removed, they would cease to be independent competitors and leave it master of the market?* If you find that such protection, and not oppression, was the purpose and the use made of such steps or parts of a plan, then the defendant is not liable in damages simply because as an incident to the carrying out of that plan, a competitor was injured in his business or property. . . .

"Competition as it exists under the laws at this date has within it the element of fight. It

permits fighting so long as it is fair and it permits the fair fighter to go away with the spoils, even though someone in that fight has been injured, and perhaps irretrievably injured in consequence; so that it is not the mere fact that a competitor suffers injury through severe competition that makes the other competitor, who may have come out of the fray successfully, liable to compensate for the losses sustained by the injured party. It is only when the injury is sustained by reason of the things forbidden by the anti-trust act that compensation can be recovered, and the things that are forbidden, so far as pertinent to this case, are those that constitute an attempt to monopolize, that is to suppress competition. *If, however, the plan and purpose and the use made thereof are to cripple the competitor and such steps or parts of such plan as carried out directly and naturally tend to the suppression of competition, no matter how slow the development of such purpose or gradual its consummation, and a competitor is injured in his business or property by reason of the carrying out of such plan, then the author and user of such plan is liable in damages for the loss thus sustained*" (italics added).

I have quoted the judge at considerable length,

because he gives the best exposition I have been able to find of the law as it affects the making of special prices to meet competition. This branch of the subject is so important, and questions of price-discriminations have come up so often in anti-trust cases, that a special section of the Clayton Act was devoted to it.[1]

"FIGHTING BRANDS"

It should be borne in mind, however, that the view of the matter above quoted is the view of the courts, while, as I pointed out in the preceding chapter, it is the Government's view which is likely

[1] Sec. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in *bona fide* transactions and not in restraint of trade.

to be important to the average business man, unless he is prepared to stand the expense of litigation. However much the statutes and the courts may surround the subject of price-discriminations with qualifications, conditions, and provisos, the Government is seldom likely to give a defendant the benefit of the doubt. The establishment of prices and terms which are not extended to all customers alike is looked upon with extreme disfavour, and is likely to be produced as evidence of unlawful intent.

Any subterfuge of form is quickly pierced by the sharp eyes of the Department of Justice. The Attorney-General's men not only are adepts at stripping off disguises, but are exasperatingly suspicious and cynical in their view of some very common methods of competition. Take, for example, the Government's description of certain acts of some manufacturers of sewing thread who were prosecuted in 1913. The following paragraphs are quoted from the Government's petition:

"When an independent succeeds in building up an appreciable business in the domestic thread and gets his brand fairly well established, the agents of said consolidated companies revive some one of their brands which has been out of use, and sell

same at a price below cost of production solely to customers of the independents, frequently exacting from such customers an agreement that they will cease handling the brands of such independents. Usually regular salesmen do not handle these brands, which are known as 'fighting brands,' and special sales forces are put on the road for this purpose who are commonly known as 'flying squadrons.' If an independent jobber refuses to deal with an agent of the combination, his retail trade is canvassed, and the orders thus obtained are offered to the independent jobber to induce him to desert his independent mill, and if he remains loyal the orders are hawked among competing jobbers until one is found who will accept and fill them; and sometimes when there is no convenient rival jobber to whom they may be given the retail orders are filled direct. . . .

"With reference to the sale of manufacturers' thread, the course pursued by defendants is to undersell the independents, frequently far below cost of production, in markets where there is competition, and to maintain full list prices, realizing thereon a good profit, in markets where there is no keen competition. Furthermore, special trust salesmen are sent out for the sole purpose of

working the independent trade. These salesmen approach the customers of independents and offer them secret rebates, payable at the end of the season, in order to induce them to cease buying independent goods. These rebates vary in amount from 2½ per cent. to 15 per cent. of the net list prices. There is no fixed method of making this rebate payment, and it may be made either by check or cash direct from the New York office or handled by the local district managers."

That is the Government's interpretation of a series of acts, most of which would probably have been set forth in quite a different light by any sympathetic and experienced salesman. The defendant companies did not contest the Government's view of the case, but consented to a decree which was entered in 1914. By the terms of that decree the defendants were perpetually enjoined:

"From using in the United States what are known in the trade and referred to in the petition herein as 'fighting brands,' hereby defined to be brands which are devised or revived and used for the purpose of being offered principally to customers of competitors at cut prices, that is to say, at prices lower, or on terms more favourable, than the price or terms, asked by the seller for

substantially the same thread under different brands or trade names. . . .

"From selling or offering to sell in the United States sewing thread of any kind below the cost of production, or at prices which, after allowing for cost of transportation and differences in prices or terms on account of differences in grade, quality, or quantity sold, are lower than the prices charged in other parts of the United States, with the intent of thereby obtaining a monopoly, or destroying or injuring the trade or business of another in sewing thread, or of preventing another from engaging in such trade or business; but nothing in this paragraph contained shall prevent the defendant corporations from offering for sale or selling sewing thread in any part of the United States at prices or on terms as low as any of their *bona fide* competitors are then and there offering, nor from offering or making different prices, terms, or conditions to different classes of customers."

MANIPULATION OF BRANDS AND PRICES

It may be stated as practically a foregone conclusion that it is not possible to cover up price-discriminations by means of any manipulation

of brands. Under ordinary circumstances, the Government does not object to the creation of new brands for the avowed purpose of meeting competition, provided that the new brands are accessible to the whole trade on equal terms. Paralleling competitors' brands is considered legitimate, so long as the distribution of the parallel brand is not confined wholly to customers of competitors, or to competitors' trade territory.

It is not at all uncommon for manufacturers in many different lines to put out brands of goods under their own trade-mark, and at the same time to sell the goods to others who put them out under private brands. In some trades it is customary thus to sell the finished product, and in other lines only the materials or ingredients are sold. In either case, the buyer of the private brand goods becomes a competitor of the manufacturer, so far as those particular goods are concerned, and unless great care is exercised such a situation may prove the source of trouble. A case of that sort is made the basis for serious allegations in the Government's suit against a glucose manufacturer. This case is still pending, upon appeal from a decision in favour of the Government. Hence the facts alleged by the

Government may in time be disproved entirely, or a very different interpretation may be placed upon them. The Government's view of the matter is extremely important, however, and is contained in the following paragraphs from the petition:

"Petitioner alleges that there have been and are throughout the United States corporations and other concerns and persons engaged in the syrup-mixing business. Many of such concerns or persons do not manufacture glucose, but buy such glucose and molasses or kindred cane products on the market, mix the same in their own factories, pack such mixed syrups under their own private brands, and engage in interstate trade in such commodities. Many of such syrup mixers necessarily purchase the glucose required by them from the defendant, . . . and said company, with intent to suppress and destroy such independent syrup mixing, has on some occasions sold its own brands of mixed syrups, particularly its 'Karo,' at such prices that the differential between the cost of glucose to said syrup mixers and the selling price of mixed syrup has been such that the business was often carried on at less than cost of manufacture to said syrup mixers.

"Petitioner further alleges that heretofore wholesale and jobbing grocers have ordered mixed syrups from said [defendant] Company, having such syrups packed at the plants of said company under the private brands of such grocers or jobbers, and that said [defendant] Company has practically suppressed the private brands of said jobbers by quoting to them prices on its own brands, particularly its 'Karo,' considerably less than the prices quoted on the syrups packed under the private brands of such jobbers. To further increase the sales of its said brands of mixed syrups and to hamper the independent syrup mixers, said [defendant] Company, has, on occasions and in markets where independent competition was aggressive, given bonuses of from one to two cases of its mixed syrups with every order for five cases of such syrups ordered by jobbers and retailers."

THOROUGHNESS OF COURT DECREES

As a plain matter of fact, the Government is quite inflexibly opposed to any manipulation of prices, by whatever means, when it has the appearance of being done in furtherance of an attempt to monopolize any considerable part of the trade.

It is one of the principles of the common law that a man may do what he will with his own property, so long as he does not thereby interfere with the right of another. He may use it or let it stand idle, he may sell it or keep it or sell only a part of it, he may even destroy it, provided, of course, that none of those acts shall infringe upon the rights of anybody else. In anti-trust cases, however, the Government is inclined to give a rather liberal interpretation to that proviso, and a manufacturer's common-law right to do what he will with his own goods is not always clear when the effect of what he does is reflected in prices. One of the most drastic consent decrees the Government ever secured bears directly upon that point, and it is significant to note the minuteness with which the decree specifies what may and may not be done with a surplus by-product. The decree in question was entered in 1913, and among other things provides:

"That said defendants and each and all of them are forever enjoined and prohibited from selling coal tar or oil tar to one or more competitors of said [defendant] Company, competing with said company in any line, for a less price f. o. b. the same point of shipment than said [defendant]

Company sells the same products to any other competitor in the same line. . . .

"That said defendant companies and defendant individuals of said companies and each of them are forever enjoined and prohibited from burning for fuel or exporting any coal tar or oil tar or briquetting pitch owned by them, when such burning or exporting is done at a net loss, taking into consideration all resulting by-products, without first advertising for thirty days for bids for such coal tar, oil tar, or pitch, and without thereby being able to sell same to competitors at higher prices; except that nothing in this clause shall prevent the defendant companies from using coal tar or oil tar as fuel when it is economical to do so or when obliged to burn liquid fuel on account of public ordinances. By the use of the word 'economical' herein is meant that when the fuel value of oil tar or coal tar is greater to said [defendant] Company than the fuel value of coal or other usable fuels, then coal tar or oil tar may be burned for fuel."

It may come as a surprise to some concerns to be told that this company was enjoined from the common practice of refusing to dump a surplus product on a weak market. Yet that is exactly

what it amounts to. It was cheaper in the end for the company to burn its by-product for fuel, or to ship it abroad at a net loss, than to flood the home market with it and permanently depress prices. But, from the Government's viewpoint, this was simply a device to force prices up, and to keep them there. Taken in connection with a number of other acts, it was construed as evidence of an attempt to monopolize the trade, and to dictate prices. What the courts would have ruled concerning the disposition of the surplus product, if the case had been contested, is, of course, problematical. The decree stands, however, just as I have quoted it. And this much, at least, can be said: that any plan which contemplates the withholding of a surplus product from the market, or the diverting of it through unusual channels, *for the purpose of controlling prices*, should be scrutinized with extreme care before it is adopted. I shall revert to this subject again, more in detail, in subsequent chapters.

These cases, which involve specific instances of price-discriminations or attempts to control prices, are very plentiful. I have selected for extended comment only those which best illustrate the general principles upon which the Govern-

ment and the courts are disposed to rely in deciding whether a given course of conduct is legitimate or the reverse. It is to be remembered that these attempts to control or to manipulate prices are not regarded as crimes *in themselves*. They are evidence of a plan or a purpose to restrain trade or to monopolize, and if the concern in question is not at the same time doing other things which the Government regards with disfavour, they may be passed over. Here, as always, the intent is the essential element of the crime, and not the overt acts which may or may not have been done as a result of an unlawful purpose. The same act may be illegal in one set of circumstances, and perfectly lawful in another, according to the purpose which actuated it.

It is quite possible, however, that a concern may be enjoined from the continuance of a price-regulating policy, and at the same time stand absolved on all other points. Such a situation is found in the Government's case against the so-called North Atlantic Steamship Pool where the court declined to dissolve the combination of steamship owners, but did enjoin the practice of using "fighting ships" to maintain steerage rates. The court's reasoning on the point is

significant as showing how, in the light of surrounding circumstances, a single act may be thrown into high relief. I quote from the decision of the court:

"The writer's opinion," said Judge Lacombe, "as to what, under prior decisions, was the construction to be given to the Sherman Anti-Trust Act, will be found fully set forth in U. S. *vs.* American Tobacco Company. . . . If that construction were followed in this case, there could be no doubt as to the conclusion to be reached upon the facts proved. It is practically not disputed that, by the various agreements and conferences which together constitute the combination complained of, that branch of trans-Atlantic commerce which is concerned with the transport of steerage passengers is arbitrarily interfered with, so that the proportion of it carried by the various lines, which have so combined, are not as they would be if full, free, and unrestricted competition were the sole controlling power to effect the distribution.

"Since the decision above cited, however, there have been two exhaustive opinions of the Supreme Court dealing with this act. Standard Oil Company *vs.* United States . . . and United States

vs. American Tobacco Company. . . . The effect of these would seem to be that contracts and methods of business, which do in fact restrain or interfere with competition, are not to be held obnoxious to the provisions of the act, unless such restraint or interference is 'unreasonable' or 'undue.' . . .

"Referring now to the facts in proof: One of the matters complained of is what is called in the testimony the providing of 'fighting ships.' Upon occasions when some steamship owner or charterer, not a member of the combination, has put a vessel on a berth adjoining one from which vessels of a member of the combination were about to sail, and has offered to carry passengers at a lower rate than that asked by such member, an extra vessel has been put on, ostensibly by one of the lines in the combination, but really by the combination itself, at the same or a lower rate, and all have co-operated to furnish such a 'fighting ship' and thereby keep out the competitor. This seems clearly to be within the prohibition of the act. . . .

"The Allan Line and Canadian Pacific Line withdrew from the 'fighting ship' agreement before the bill was filed. As to both these defendants

the bill is dismissed. As to the other defendants injunction will issue against the continuance of the 'fighting ships,' and as to the other prayers for relief the bill is dismissed."

The fact that, on appeal to the Supreme Court, the decree was reversed and the bill entirely dismissed, on the ground that the European War had put an end to the Pool, does not detract from the significance of this injunction against the use of "fighting ships."

CHAPTER V

"EXCLUSIVE-DEALER" AGREEMENTS

THERE are very few trades indeed in which some form of exclusive agreement with distributors does not exist. Such agreements are sometimes based upon written forms of contract. Sometimes they may rest solely upon an oral understanding between the parties. A manufacturer may grant the exclusive sale of his product to a single dealer in a town, or to a single jobber in a given territory, in return for a certain standard of service; or he may offer to sell his goods only to those dealers or jobbers who will refrain from handling the goods of competitors. Again, he may confine the sale of some special product to such distributors as will agree to handle his whole line; and so on. The manufacturer of a number of products in the same general class sometimes parcels them out among the several dealers in a given town, granting to each dealer the exclusive

right to sell a particular product. The producer of some single product may sell it to all distributors for resale under private brands, and at the same time give certain jobbers the exclusive sale of the same product under the factory brand. In fact, the forms of exclusive agreement are so varied, and its use is so extensive, that almost every manufacturer or distributor comes at some point into contact with it.

Now each of those forms of agreement, as well as some others which I have not mentioned specifically, has at some time or other been woven into the fabric of a Government prosecution for restraint of trade. Some of them have been specifically upheld by the courts, and some have been definitely condemned. Some have been sharply criticized when occurring in one set of circumstances, while the same acts have been declared blameless when they were committed under different conditions. To attempt to ascertain the legality of a particular form of exclusive agreement may seem like trying to locate the elusive pea under the three walnut-shells—much of this whole subject of the anti-trust laws bears some resemblance to that pastime—yet the manufacturer, and particularly the advertising manu-

facturer, may find that great consequences depend upon that very issue. No one who has not actually had the experience can understand the dogged persistence with which the Government pursues the slightest suspicion that such agreements exist, or the ingenuity that it sometimes exercises in putting upon them the most sinister interpretation.

It may be stated briefly that nothing is calculated to arouse the energies of the Department of Justice more quickly than the suggestion, no matter how remote, that a product is sold on an "exclusive" basis. The cross-examinations which are conducted by the Government agents with a view to ferreting out suspected agreements with jobbers or dealers are almost unbelievably vigorous and remorseless. Let me cite one instance which fell under my own observation.

"EXCLUSIVE-DEALER" AGREEMENTS UNDER SUSPICION

A certain concern had received an application for territory from a jobber somewhere in the Middle West. For perfectly legitimate reasons, this concern did not desire to take on that particular jobber, and yet did not care to offend him. So the president wrote him a nice letter, stating that it

had been found advisable to deal only through jobbers who did a certain minimum gross business and employed a certain number of salesmen. There were some other conditions, too, of no particular importance, and the whole thing consisted of a rather graceful "turn down" which effectually disposed of the whole matter.

But a year or two later, when the concern was under suspicion of restraining trade, the Government discovered the carbon copy of that letter in the files, and straightway demanded a copy of the concern's "agreement" with its distributors. No such "agreement" existed, or ever had existed, yet the Government nearly turned the whole organization upside down in the endeavour to find one. The casual "turn down" of an undesirable customer had become a formidable piece of evidence, and the officers of the concern spent many long and perspiring hours with the District Attorney before they succeeded in explaining it to his satisfaction.

I mention this incident chiefly for the purpose of showing the importance which the Government attaches to exclusive relationships with distributors. We shall find, when we come to examine the court opinions, that they are not always in

harmony with the Government's notions. But this fact is to be noted: After a few complaints have been made which have even a superficial appearance of soundness, the Government is almost invariably certain to put the most sinister construction upon such a relationship. A system of distribution through "exclusive-dealers" or -jobbers is often the first point of attack and the object of the most bitter condemnation. A special section of the Clayton Act[1] was, indeed, framed for the purpose of emphasizing the importance of this branch of the subject.

Now here again it is necessary to bear clearly in mind the distinction between the view of the Government and the view of the courts. There

[1] SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

is little doubt that the Department of Justice regards any form of "exclusive-dealer" agreements with foreboding. The courts, however, have not yet been inclined to take such an extreme view, and the conflicts which are so often apparent between the terms of consent decrees and the principles laid down in court opinions are, to say the least, confusing. And this confusion has now been augmented by the enactment of the Clayton Law. Unquestionably the Government officials believe that the Clayton Law specifically upholds their views as to "exclusive-dealer" agreements. Thus, according to Section 3, "it shall be unlawful for any person . . . to . . . make a sale . . . of goods . . . on the condition, agreement or understanding that the purchaser thereof shall not use or deal in the goods . . . of a competitor . . . *where the effect of such . . . sale . . . may be to substantially lessen competition or tend to create a monopoly*" (italics added).

But nobody knows exactly what it means to "substantially lessen competition or tend to create a monopoly." Until the courts have had a chance to pass upon it, its meaning is certainly debatable. Without doubt the Government will insist upon the strictest possible construction, and it is equally

certain that the courts will weigh it in the light of public policy. Just as the Sherman Act which, when read literally, forbids attempts to monopolize *any part* of trade or commerce, has nevertheless been modified by the famous "rule of reason," so the Clayton Act will presumably be interpreted in such way as best promote the public welfare.[1] It is quite futile to attempt to make predictions. The Government's first important case under the Clayton Act was filed, in October, 1915, at St. Louis, against the United Shoe Machinery Corporation, and a year or two may perhaps elapse before a final adjudication can be arrived at. It is useful, however, to point out that the views of the courts as expressed in a number of carefully considered opinions, under the Sherman Act, are

[1] It is interesting to note that while the Clayton Act apparently forbids the manufacturer to make an agreement with a dealer whereby the latter is restrained from dealing in the goods of competing manufacturers, the Act does not prohibit the dealer from making an agreement restraining the manufacturer from selling to competing dealers. In passing the Clayton Act, Congress did not seem to fear that restraint of trade might arise when *a dealer* prevents his fellow merchants from handling a manufacturer's goods. So far as the Clayton Act is concerned, the dealer can say to the manufacturer: "I will handle your line if you will sell it to nobody else in my trade territory." The dealer can tie up the manufacturer as much as he likes, but the moment the manufacturer attempts to tie up the dealer the Clayton Act steps in.

not at all in harmony with the contentions of the Government as they appear in consent decrees, in bills of complaint, and in the Government's construction of the Clayton Act. Let us examine one of the leading contested cases on this point of "exclusive-dealer" agreements, and compare the reasoning of the court with the claims of the Government.

A COURT'S VIEW OF THE MANUFACTURER'S RIGHTS

The case in question is that of an individual who sued for threefold damages under the Sherman Act against a tobacco manufacturer. The manufacturer sold its products at a certain price to such customers as would not handle competing goods, and charged a uniformly higher price to other customers. It was alleged that this arrangement constituted an attempt to monopolize such as is forbidden by the Sherman Act, and suit was filed by a dealer who felt that he had been injured by it. In deciding the case, in 1903, the court said:

"The tobacco company and its competitors were not dealing in articles of prime necessity, like corn and coal, nor were they rendering public or quasi-public service, like railroad and gas

corporations. Each of them, therefore, had the right to refuse to sell its commodities at any price. Each had the right to fix the prices at which it would dispose of them, and the terms upon which it would contract to sell them. Each of them had the right to determine with what persons it would make its contracts of sale. . . . The exercise of these undoubted rights is essential to the very existence of free competition, and so long as their exercise by any person or corporation in no way deprives competitors of the same rights, or restricts them in the use of these rights, it is difficult to perceive how their exercise can constitute any restriction upon competition or any restraint upon interstate trade.

"The acts of the defendant which are alleged by the complaint in this action to constitute an unlawful restraint upon interstate commerce are nothing more than the lawful exercise of these unquestioned rights which are indispensable to the existence of competition or to the conduct of trade. The tobacco company and its employee fixed the prices of its commodities so high that the plaintiff could not profitably buy them. This was no restriction upon free competition, because it left the rivals of the company free to sell their

competing commodities at any price which they elected to charge for them. It would have been no violation of the law under consideration if the tobacco company and its employee had combined to refuse to sell any of its commodities at any price, and to retire from the business in which they were engaged entirely. Much less could it be a violation of this act for them to fix their prices too high for profitable investment by the plaintiff.

"The tobacco company and its employee sold its products to customers who refrained from dealing in the goods of its competitors at prices which rendered their purchases profitable. But there was no restriction upon competition here, because this act left the rivals of the tobacco company free to sell their competing commodities to all other purchasers than those who bought of the defendants, and free to compete for sales to the customers of the tobacco company by offering to them goods at lower prices or on better terms than they secured from that company. The tobacco company and its employee were not required, like competitors engaged in public or quasi-public service, to sell to all applicants who sought to buy, or to sell to all intending purchasers

at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons. In the exercise of this right they selected those persons who would refrain from handling the goods of their competitors as their customers, by selling their products to them at lower prices than they offered them to others. There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral. . . .

"It is contended, however, that this selection by the defendants of customers who refrained from selling the goods of their competitors violated Section 2 of the anti-trust act, because it was an 'attempt to monopolize . . . part of the trade or commerce among the several States.' It is admitted that the practice of the defendants was not only an attempt, but a successful attempt, to monopolize a part of this commerce. But is every attempt to monopolize any part of interstate commerce made unlawful and punishable by Section 2 of the Act of July 2, 1890 . . . ? If so, no interstate commerce has ever been lawfully conducted since that act became a law, because every sale and every transportation of an article

which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it, and competition necessarily ceases—dies. Every person engaged in interstate commerce necessarily attempts to draw to himself, and to exclude others from, a part of that trade; and, if he may not do this, he may not compete with his rivals, all other persons and corporations must cease to secure for themselves any part of the commerce among the States, and some single corporation or person must be permitted to receive and control it all in one huge monopoly. . . .

"It was not—it could not have been—the purpose or the effect of the second section of this law [the Sherman Act] to prohibit or to punish the customary and universal attempts of all manufacturers, merchants, and traders engaged in interstate commerce to monopolize a fair share of it in the necessary conduct and desired enlargement of their trade, while their attempts leave their competitors free to make successful endeavours of the same kind. The acts of the defendants

were of this nature, and they did not violate the second section of the law. An attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the States, violates the second section of this act. But an attempt to monopolize a part of interstate commerce which promotes, or but indirectly or incidentally restricts, competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made, and was not made, illegal by the second section of the act under consideration, because such attempts are indispensable to the existence of any competition in commerce among the States.

IS IT RIGHT TO FAVOUR "EXCLUSIVE-DEALERS"?

"There is another reason why the complaint in this action fails to state facts sufficient to constitute a cause of action: The sole cause of the damages claimed in it is shown to be the refusal of the defendants to sell their goods to the plaintiff at prices which would enable him to resell them with a profit. Now, no act or omission of a

party is actionable, no act or omission of a person causes legal injury to another, unless it is either a breach of a contract with or of a duty to him. The damages from other acts or omissions form a part of that *damnum absque injuria* for which no action can be maintained or recovery had in the courts. The defendants had not agreed to sell their goods to the plaintiff at prices which would make their purchase profitable to him, so that the damages he suffered did not result from any breach of any contract with him. They were not caused by the breach of any legal duty to the plaintiff, for the defendants owed him no duty to sell their products to him at any price—much less at prices so low that he could realize a profit by selling them again to others. The complaint therefore fails to show that any legal injury or actionable damages were inflicted upon the plaintiff by the acts of the defendants and the judgment below is affirmed."

This doctrine has been several times upheld in the courts. It was affirmed in slightly different phraseology in the Cream of Wheat case, in 1915, where Judge Hough said:

"Numerous individuals and corporations have been enjoined from restraining the trade of other

people, no matter how flourishing the offender's trade might be, nor how greatly the general volume of trade has increased during the period of restraint. But *never before has it been urged that, if I. S. made enough of anything to supply both Doe and Roe, and sold it all to Doe, refusing even to bargain with Roe, for any reason or no reason, such conduct gave Roe a cause of action*" (italics added).

In the Cream of Wheat case there was, to be sure, no question of "exclusive-dealer" agreements; and the protestation above quoted was elicited by the plaintiff's contention that the Cream of Wheat Company's mere refusal to sell was in violation of the Clayton Act because inspired by the Cream of Wheat Company's desire to discipline the plaintiff in violation of the anti-trust act for "cutting" resale prices on Cream of Wheat. But if maintenance of resale prices can be compelled by exercise of the right to refuse to sell, then certainly it ought to follow that manufacturers can refuse to fill further orders from dealers who persist in handling rival goods, and by this means can circumvent the alleged purpose of the Clayton Act. In this connection Judge Lacombe's language in the opinion of the Circuit Court of Appeals con-

firming Judge Hough's decision above quoted is particularly emphatic.

"We had supposed," said the judge, "that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern. . . . Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. *We have not yet reached the stage where the selection of a trader's customers is made for him by the government*" (italics added).

With this view the Government has several times expressed a hearty dissent, and neither the right of refusal to sell nor the legal status of "exclusive-dealer" agreements can yet be regarded as finally settled. The Watch-case decision in a preceding chapter has been contrasted with the

Cream of Wheat case. There the Watch-case company had sent out a circular requesting "that the jobbers to whom we sell our goods shall not deal in any watch-cases other than those manufactured by us." In enjoining the company from enforcing this threat against its dealers. the court said:

"They were already established customers, not only of the defendant company, but also of its competitors, and had already become trade outlets for every manufacturer of cases whose wares they had been accustomed to buy. Now, what the defendant company did was either to close these already existing and already utilized outlets, or to narrow them materially, so far as the cases of its competitors were concerned; and we think the proposition need not be discussed that this was *pro tanto* a direct and unlawful restraint of trade."

That an "exclusive-dealer" agreement may be legal, if standing alone, was intimated by Judge Hazel, in 1915, in the Kodak case.

"Defendants argue generally," said the judge, "that manufacturers have the legal right to encourage dealers by extra profits or by other fair inducements to handle their goods exclusively;

that such an arrangement is to the interests of both; and that the Eastman Kodak Company was the first to induce stationers, druggists, and others to handle its goods as a side line. *All this and more, it may be conceded, separated from other acts, might furnish no ground for holding that there was an illegal monopoly,* but the arbitrary enforcement of the restrictive conditions by the establishment of a system of espionage and the keeping of records of violations of such conditions with a view of penalizing such dealers, are evidences of an intention to promote a monopoly" (italics added).

The Supreme Court, in 1915, expressed the same view, and sustained the validity of a contract for exclusive dealing entered into by a dealer with a glucose manufacturer in consideration of a promised rebate, after holding that the fact that the glucose manufacturer was an unlawful combination could not be availed of in the action. That this system of contracts, along with other contracts of this glucose company, has since been denounced as monopolistic by the District Court, in a Government suit against the company under the anti-trust act, and the company has been ordered to be dissolved as a combination in viola-

tion of the anti-trust act, merely illustrates the now familiar fact that a practice innocent in itself may nevertheless be a link in the chain of a conspiracy in restraint of trade.

WHAT CONSENT DECREES SHOW

This is what the courts show. From this it might seem safe to assume that an agreement with a dealer to handle one's goods exclusively would be lawful, provided that the goods are not a necessity of life, that competitors are not restrained from competing with one another, and that the situation is not complicated by other acts in restraint of trade. This involves, however, the further assumption, that, as Judge Hough says elsewhere in his decision above quoted, "there is nothing in the Clayton Act"—notwithstanding its language about "substantially lessen competition or tend to create a monopoly"—"to compel or induce courts to hold that the trade restraint referred to by this statute differs in kind, quality, or degree from that now held to be meant by the Sherman Act"; and this assumption is quite at variance with the notions of the Government on the subject. It is conceivable that the doctrine expressed above may

still be successfully defended in the courts, in spite of the Clayton Act; but unless a man is prepared to stand the expense of a trial he is likely to be more interested in Uncle Sam's view of the matter. And his view, as expressed in some of the consent decrees, presents some very interesting contrasts to the doctrine laid down by the courts in the decisions above quoted.

For example, we find in the consent decree obtained, in 1914, against some thread manufacturers, that the defendants were perpetually enjoined "from soliciting or exacting from wholesale or retail dealers or jobbers or from customers of competitors in the United States any agreement not to handle or to cease handling the brands of competitors; or from refusing to deal with, or discriminating against, or threatening to refuse to deal with or to discriminate against those who handle the goods of competitors; or from canvassing the retail trade of any dealer or jobber and thereupon offering the orders thus obtained to such dealer or jobber upon condition that he shall cease to buy thread from a competitor of the defendant or of any of them."

That is pretty sweeping and comprehensive, and so is the decree consented to, in 1911, in the

Electric Lamp case which provides that the defendants are "perpetually enjoined and restrained from making or enforcing any contracts, arrangements, agreements, or requirements with dealers, jobbers, and consumers, who buy from the said defendants either tantalum filament, tungsten filament, metalized carbon filament or ordinary carbon filament lamps, or any of them, by which such dealers, jobbers, and consumers are compelled to purchase all their ordinary carbon filament lamps from said defendants as a condition to obtaining such other types of lamps, or any of them, or by which dealers, jobbers, and consumers are compelled to purchase any one or more of the above-mentioned types of lamps from the said defendants as a condition to the purchase or supply of any other or all of said types of lamps; and . . . from discriminating against any dealer, jobber, or consumer desiring to purchase tantalum, tungsten, or metalized carbon filament lamps because of the fact that such dealer, jobber, or consumer purchases ordinary carbon filament lamps from others, and are perpetually enjoined and restrained from discriminating against any dealer, jobber, or consumer desiring to purchase any one or more of the above-mentioned types of

lamps because of the fact that such dealer, jobber, or consumer purchases any other of said lamps from other manufacturers or dealers."

No comment is necessary on the foregoing. It is evident that the Government goes further—to say the least—than the carefully qualified conclusions of the courts in the decisions above quoted. An agreement with a distributor which prevents him from handling competing goods is evidence of the manufacturer's wrongful intent, and he must take the burden of relieving himself from that presumption. However much the courts may have conceded to be still within the positive rights of business men, the Government still inclines to its own theory of the matter.

THEORY APPLIED TO DIRECT SALES

Even with respect to sales direct to the consumer, the Government holds to the same theory. Thus in the petition against some can manufacturers—a case which is now being contested in the courts—we find the following accusation:

"For the purpose of maintaining control of the market, the principal defendant has induced or compelled its customers to enter into long-time contracts to purchase cans exclusively from it,

and has prevented its customers from dealing with such independent establishments as exist, by threats (among others) that if they do so it will cancel the contracts it already has with such customers and will refuse to enter into further contracts with them or sell any cans to them. The effect of such threats and acts is to prevent and restrain dealings with independent can makers."

Again, in the petition in a case against a glucose manufacturer now pending on appeal from a decision in favour of the Government, the petition recites:

"In November, 1906, just prior to the time that the first independent glucose factory placed its products on the market, the defendant . . . submitted to the trade what was designated as a profit-sharing plan or proposition, and announced that they would set aside out of the profits from the sale of glucose and grape sugar for the last six months of the year 1906 and pay to their customers an amount equal to ten cents per hundred pounds on all sales of glucose and grape sugar made to such customers during such period, the payment of the profits to be made on December 31, 1907, on condition that for the remainder of the year 1906

and throughout the entire year 1907 such customer should purchase exclusively from the [defendants] all the glucose and grape sugar required for use in their establishments. The rebating or profit-sharing plan was continued until the year 1910."

It is the practice of the Government, when a substantial looking complaint under the Sherman Act has been lodged against a manufacturer, to place upon him the whole burden of proving that his "exclusive-dealer" relations are free from the taint of a wrongful purpose. Not every concern can afford the expense of protracted litigation against the vast resources of the Department of Justice. Very often a consent decree is the only way out of a bad corner, and under those circumstances the Government is usually able to insist upon its own interpretation.

It is interesting to note, in the Harvester case which is now awaiting a final decision before the Supreme Court, the breadth of the Government's original charges as contrasted with the results of the trial of the case. Although the Government won its case in the lower court, none of the charges based on its dealer contracts appear to have been sustained. In its petition, however, which was filed in the District Court in 1912, the Government

laid great stress upon certain "exclusive-dealer" agreements which it regarded as clearly unlawful, and as evidence of a purpose to monopolize the trade. I quote from the original bill of complaint:

"By reason of the fact that defendants manufacture the well-known and standard types of harvesting machines and implements, without which the implement dealer can only with great difficulty, if at all, maintain a successful business, defendants have been and now are enabled to compel such implement dealers to enter into [exclusive] contracts of the character described.

"In towns where there are more than one retail implement dealer defendants have adopted and are now carrying out the policy of giving to each dealer the exclusive agency for a certain well-known machine, such as the 'McCormick' or 'Deering' grain binder or mower, instead of giving to one dealer an agency for all defendants' lines, intending thereby to obtain for themselves the services of all responsible implement dealers, and, by means of the contracts hereinbefore described, to monopolize all trade and commerce in harvesting and agricultural implements.

"Since defendants acquired a monopoly of harvesting machinery, they have expanded into

other lines of agricultural implements and are now engaged in securing a monopoly of those lines, among other ways by threats to dealers to withhold from them the harvesting implements of the combination unless given special treatment and preferences in respect to the new lines of agricultural machinery manufactured by defendants, or by allowing special confidential commissions on harvesting machinery to such dealers, or by giving unusual credit, or by the exercise of the power given by the annulment clause in the contracts above described."

After a long and protracted trial, not one of those charges of illegality was apparently sustained by the court. But if the International Harvester Company had been a small concern, which had been unable to contest the case, or if it had been unwilling to submit to all the disagreeable publicity which goes with a Government prosecution, it would most probably have been compelled to consent to a decree finding the company guilty of all these agreements, and branding all of them as illegal, and restraining the company from continuing any of them. No matter how necessary some of them may have been to the welfare of the company's business, the Government's theory

of their illegality would probably have wiped them off the slate then and there. That is one of the main reasons why "exclusive-dealer" arrangements should be entered into with the greatest circumspection, and watched with the greatest care and patience. The view of the courts, as expressed in leading cases, gives a good deal of latitude to the manufacturer who wants to protect his product by some form of exclusive contract, but the attitude of the Government, with the encouragement it appears to draw from the Clayton Act, indicates that he may possibly have to fight for it.

CHAPTER VI

THE SCOPE OF PATENT PROTECTION

A CERTAIN large concern, which is wise in this day and generation, recently sent to its sales force the following emphatic instruction:

"We take this occasion to thank the individual members of the sales force who have taken the trouble to send us letters of congratulation upon the recent favourable patent decision. It has not been possible to answer those letters individually, but they are appreciated none the less on that account.

"Our success in this patent matter is a source of great satisfaction to us and to the whole organization. We have thought it best that our salesmen and agents should have full information on the subject, and a copy of the court's opinion is enclosed herewith. You are cautioned definitely and specifically, however, that this information is *under no circumstances to be used in your talks*

with customers or prospective customers for our goods. You are to explain to every person who inquires that requests for this information must come direct to the company's patent department."

Now, the aggressive sales manager is quite at liberty to regard that ruling as a shameful waste of good material. It is quite possible that the sales manager of the concern in question does so regard it. But the concern is wise to sacrifice whatever sales value there may be in a talking-point based upon an infringement suit against a competitor, for the patent law offers no means of escape from the provisions of the anti-trust laws. The courts have repeatedly passed upon that point, and more than one concern has met with condemnation for indulging in the very practice which is forbidden in the instructions quoted above.

INFRINGEMENT A DANGEROUS COMPETITIVE ARGUMENT

Now, going back for a moment to the matter of using infringement suits as talking-points with customers. It is evident that when a concern sues a competitor for patent infringement and possibly collects heavy damages therefor, it is wholly within its rights as laid down by the patent

law. But when it permits its salesmen to use the infringement suit as a competitive argument to intimidate competitors' customers, and to prevent competitors from selling their goods, it is rapidly getting outside of the domain which is covered by the patent law. Such tactics are not provided in the patent law, and, further, are not necessary to protect the rights of the patentee in the exclusive enjoyment of his invention. So we come to a second general principle, which is this: Patent infringement is no justification for unfair competition.

It is highly important for the manufacturer of patented goods to get these principles clearly in mind and to keep them there. The patent law is one thing, while the anti-trust laws are something quite different. The use of patents to accomplish what would otherwise be construed as a violation of the anti-trust laws has been repeatedly tried and repeatedly condemned. It is not only natural, but often praiseworthy, for a manufacturer to desire to get the greatest possible return from his investments which are covered by patents; but the Government is quite as persistent in its demands that patents shall not be used to restrain trade illegally.

From the comparatively simple case stated at

the head of this chapter we may turn to the complexities of the Government's prosecution of the Cash Register officials. Threats and warning notices concerning infringement suits formed an important part of the evidence in that case. The question as to whether or not they went beyond what was necessary to protect the company's patent rights was not specifically determined. In fact, much of the evidence was excluded which the company offered to show that it was subjected to outrageous piracy by its competitors, and that was one of the grounds upon which the Circuit Court of Appeals, in 1915, granted the defendants a new trial. It was declared, however, as a general proposition, that threats and warning notices *taken in connection with other acts* might, under certain circumstances, be evidence of a purpose to crush competition and to monopolize trade.

Bear in mind that what are here being discussed are actual, not supposititious, infringements; and now see what the court in the Cash Register case had to say about the patentee's duty, under the anti-trust act, to his competitor, the infringer, who under the patent law has no right whatsoever to market the infringing article.

"This brings before us," says the court, "the question whether a patentee and another, or the officers and agents of a patentee, can conspire in restraint of the interstate trade or commerce in the article covered by the patent of persons who have no right to engage in such trade and commerce and who by engaging therein infringe the right of the patentee; *i. e.*, whether such a conspiracy comes within that section. Its disposition involves the rights of a patentee. These rights are two, one statutory, and the other at common law. The statutory right is usually stated in its adjective form; *i. e.*, to exclude or to prevent others from making, using, or selling the article covered by the patent, or, in other words, to sue or to bring actions against others who are or have been making, using, or selling them. But this right has also a substantive form. It is that others shall refrain from making, or using, or selling the article. The patentee's right at common law is to make, use, or sell the article. This right is to no extent dependent on the statute. The patentee, therefore, has the right to have others refrain from selling the article covered by his patent, and if they will not do so he has the right to prevent them from selling by suit. Has a patentee, then,

the right to prevent any infringer from selling the article covered by his patent in any other way? He certainly has no right to do it by killing him, or destroying his factory, or such infringing articles as he may own. In selling the infringing article, no assaults are made upon his person, so that there is no room for claiming that his action was in self-defense. And the infringer owns his factory and articles. The patentee may be entitled to a destruction of the infringing articles through the process of the court, but not otherwise. But has he the right to prevent him from so doing by action outside of the courts, not involving an invasion of the rights of person or property of the infringer; *i. e.*, by the use of means which would be wrongful if used by him to prevent another from selling articles not covered by his patent—*i. e.*, such means as are charged here?

"*We are not concerned here with the question as to what a patentee may himself do in a general way to protect the substantive right which he has from invasion. The question in hand is whether he and another, or his officers and agents in his interest, may conspire to prevent an invasion of his rights in the interstate field by the use of any such*

means. This depends solely on whether such a conspiracy is within the first section of the anti-trust act. *And it would seem that to ask this question is to answer it.* The terms of the section are of a most sweeping character. It includes every conspiracy in restraint of interstate trade or commerce. It is not a question whether it is rightful or wrongful interstate trade or commerce that is covered by the conspiracy. It is sufficient that it is interstate trade or commerce. If two or more persons in no way interested in a patent were to conspire in restraint of the interstate trade or commerce of an infringer, no one would contend that the conspiracy was not covered by the statute. No more is it open to contend that a conspiracy by a patentee and another, or by the officers and agents of a patentee in his interest, to restrain the interstate trade or commerce of an infringer, is not within the statute. The intent of the statute was to sweep away all conspiracies in restraint of such trade or commerce, whatever their character may be. The statute respects the monopoly of the patentee. . . . But the right to conspire with another or others in his interest in restraint of the interstate trade or commerce covered by his patent is not one of the

rights conferred thereby, and such a conspiracy is within the statute" (italics added).

PATENT RIGHTS NO LICENSE AGAINST POSITIVE PROHIBITIONS

There is a good deal of very hazy thought on the subject of the rights conferred by the patent law, largely arising from the fact that the law itself provides for a legal monopoly. But the monopoly conferred by the patent law is a definite and limited monopoly which includes only the right to prevent others from making, using, or vending the particular invention which is covered by the patent. Further, the term of the monopoly is limited to a period of seventeen years. Any attempt to extend the monopoly to other things which are not a part of the invention that the patent covers, or to make the monopoly effective after the expiration of the seventeen-year term, falls outside the domain covered by the patent law. When such attempts happen to run counter to the provisions of the anti-trust laws—or any other laws, for that matter—it is quite useless to appeal to the patent law for protection. The patent law will not protect such acts as are entirely outside its scope any more than the laws of Canada will protect

the merchant who does business in Oswego, N. Y. Sometimes it is not easy to tell whether a given act falls under the protection of the patent law or remains entirely outside it, but it is a task which the courts are quite ready to undertake. The Sanatogen case, for example, was carried all the way to the Supreme Court of the United States before it was definitely decided that the patent monopoly could not be extended by a mere notice on the package so as to protect the price of the goods after they had passed out of the manufacturer's control.

While there is difficulty in drawing the line where the patent monopoly ends in any given case, this much may be set down as a general principle: The possession of a patent is no justification for acts which are not provided for in the patent law or are not necessary for the protection of the rights of the patentee.

Let us examine some specific instances of the use of patents which have been condemned by the Government and the courts. In the Bath-tub case, for example, a combination of manufacturers and jobbers of plumbing supplies was based upon a system of licenses to use a patented tool which was of some importance at certain stages in the

production of enamelled ware. In order to obtain a license to use the patented tool in question, manufacturers were obliged to subscribe to a license agreement which provided, among other things, that they would deal only with such jobbers as entered the combination. The jobbers, in turn, were obliged to agree to deal exclusively in the products of licensed manufacturers, if they wished a license to sell any goods which were made with the help of the patented tool. This structure, so carefully erected under the ostensible protection of the patent law, was dismantled by the Supreme Court of the United States in a careful decision which was handed down in 1912. In the course of its opinion, the court said:

"Before the agreements the manufacturers of enamelled ware were independent and competitive. By the agreements they were combined, subjected themselves to certain rules and regulations, among others not to sell their product to the jobbers except at a price fixed not by trade and competitive conditions but by the decision of the committee of six of their number, and zones of sales were created. And the jobbers were brought into the combination and made its subjection complete and its purpose successful.

Unless they entered the combination they could obtain no enamelled ware from any manufacturer who was in the combination, and the condition of entry was not to resell to plumbers except at the prices determined by the manufacturers. The trade was, therefore, practically controlled from producer to consumer and the potency of the scheme was established by the co-operation of 85 per cent. of the manufacturers and their fidelity to it was secured not only by trade advantages, but by what was practically a pecuniary penalty, not inaptly termed in the argument 'cash bail.' The royalty for each furnace was $5.00, 80 per cent. of which was to be returned if the agreement was faithfully observed; it was to be 'forfeited as a penalty' if the agreement was violated. And for faithful observance of their engagements the jobbers, too, were entitled to rebates from their purchases. It is testified that 90 per cent. of the jobbers in number and more than 90 per cent. in purchasing power joined the combination. The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. . . .

"The agreements in the case at bar combined

the manufacturers and jobbers of enamelled ware very much to the same purpose and results as the association of manufacturers and dealers in tiles combined them in Montague & Co. *vs.* Lowry . . . which combination was condemned by this court as offending the Sherman law. The added element of the patent in the case at bar cannot confer immunity from a like condemnation for the reasons we have stated. And this we say without entering into the consideration of the distinction of rights for which the Government contends between a patented article and a patented tool used in the manufacture of an unpatented article. Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights a universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained.

"This court has had occasion in a number of cases to declare its principle. Two of those cases we have cited. The others it is not necessary to review or to quote from, except to say that in the very latest of them the comprehensive and thorough character of the law is demonstrated and

its sufficiency to prevent evasions of its policy 'by resort to any disguise or subterfuge of form,' or the escape of its prohibitions 'by any indirection.' United States *vs.* American Tobacco Co. . . . Nor can they be evaded by good motives. The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results."

WHERE IS THE DIVIDING LINE?

The principle that is laid down by the Supreme Court in the opinion quoted from above has been repeatedly upheld. Any agreement which attempts to do more than is actually necessary to protect the use of the patent is likely to be examined in the light of the anti-trust laws, and when that happens the patent law is no protection. Such was the situation in the recently decided suit in the United States District Court at Philadelphia against some motion-picture patentees. In that case the combination actually controlled a large number of the basic patents of the industry, and a holding company was formed for the sole purpose

of owning the patents and issuing licenses for their use. But when the holding company apparently went beyond the rights conferred by the patent law in restraining distributors from handling motion-picture supplies other than those covered by the patents, on the threat of withdrawing the patented goods entirely, the anti-trust act was successfully invoked. The court cites the Bathtub case with approval, and goes on to say:

"We would feel constrained, on the authority of this case alone, to find that the agreements and acts of the defendants in the present case went far beyond what was necessary to protect the use of the patents or the monopoly which went with them, and that the end and result, which would be expected to be and was accomplished, was the restraint of trade condemned by law."

Just how far, then, *is* it safe for a manufacturer to go in the direction of attempted control of the distribution and sale of his patented goods? That is a question which is not easily answered authoritatively, for here, as always, the question of intent plays so large a part in the final determination of any specific case. Two very recent cases will illustrate the point I am trying to make: the case of a graphophone manufacturer against a

department store, decided in September, 1915, and the case of the Ford Motor Company against a sales company, which was decided in December, 1914.

These were cases involving the validity of certain contracts which provided, among other things, that a resale price specified by the manufacturers should be maintained by the dealers. In the Graphophone case the contract as respecting the point at issue was upheld; in the Ford case it was declared invalid. Both cases involved this question: Was it the intent of the manufacturer to part with his *exclusive right to sell* within certain limits, or did he merely part with *the title to the goods* and then attempt to exercise control over them? Granted that the patentee possessed the exclusive right to sell; was he sharing that right with someone else, or was he exercising it to the full himself, and at the same time trying to restrain the common-law rights of somebody else? That may all sound like a distinction without a difference, but the courts do not regard it in that light. Let us examine opinion in the Ford case of Judge Hollister of the United States District Court at Cincinnati.

"For the purposes of this case," said Judge Hollister, "it may be assumed that if the contract

partakes of the quality of a sale of the exclusive right to sell, or of a license to sell, it is a good contract which the complaint may legally enter into with its dealers, and, under the facts proved in this case, an injunction must issue against the defendants. But if, under the terms of the contract, the complainant has sold the automobiles made by it and delivered the same to its dealers, passing the title upon receipt of the contract price, then, under the decisions of the Supreme Court and on principle, the conclusion, in my judgment, must be that by such sale the complainant has exercised its exclusive right to sell, so far as the particular commodity sold is concerned, and cannot legally fix the price at which the dealer shall resell. . . .

"This contract does not give the vendee the right to sell. It sells to him the article, and attempts to give him the right to resell. He buys. The manufacturer-patentee sells the product to him, and then seeks to control the price at which he shall resell. If, upon payment by the dealer of the purchase price, the title of the machine passes to him, how can it be taken away because the user, to whom the dealer has sold, has paid a less price than the list price? . . .

"When the complainant sold an automobile under one of these contracts, and received the price, the title passed to the purchaser, and no sale by the purchaser to another could cause a reverter of the title to the complainant; for, in the complete exercise of his right to sell, he sold, and the subject of sale passed without the limits of the monopoly."

In the Graphophone case, however, Judge Geiger, of the United States District Court at Chicago, came to a different conclusion.

"Grant," he said, "that a patentee cannot, by a mere notice, burden an article during the life of the patent with a resale price restriction, that he cannot make a notice attached to the article discharge the function of a 'covenant running with the land,' as in real estate sales, and that when he *sells*, he *sells*, we still have the question: How effectively can he and his vendee bargain respecting the exercise of his exclusive right of sale? If it be the law that he cannot make *any* bargain with *his vendee* which involves price restriction, then, of course, in that respect he is on competitive, and not on monopolistic, ground. He is in the position where he may rightfully withhold the manufacture, use, and sale from the whole public, and yet, when he proceeds

to sell, must submit to the very policy which the public, in granting him the monopoly, has surrendered to him. . . .

"In view of the language in Bauer *vs.* O'Donnell [the Sanatogen case], which discloses so clear a purpose to limit it to the precise facts, it is my judgment that it does not, and was not intended to, overrule the other cases which seem so firmly to have established the general proposition upon which the sufficiency of the complaint in the present case depends. In other words, the complaint shows a contract which, against the defendant, as a purchaser from the patentee, is valid and enforceable."

PATENT RIGHTS STILL HAVE ADAPTABLE USES

Now it is apparent from the decisions just quoted that there are certain limits within which the courts will uphold attempts by a patentee to share his exclusive rights with others, but that there is a point beyond which such an extension of patent rights cannot be carried. Two leading cases decided by the Supreme Court tend to establish the same thing: the Bath-tub case which I have quoted extensively above, and the Creamery Package case which was decided two months later.

This last-named case involved a very complicated series of contracts between several different concerns relating to the use and sale of patented butter-making machinery. After summarizing the evidence at considerable length, Mr. Justice McKenna summed up the conclusion of the court in the following language:

"The Owatonna Company did nothing more in its contract with the Creamery Package Manufacturing Company than to make that company its exclusive sales agent, and this was no violation of law. Both contracts had natural and adequate legal inducements and conveyed rights that could under the law be conveyed, and, as a necessary incident to the conveyance, one only of the parties could thereafter exercise them. It may be that the Disbrow Company was to an extent in competition with the Owatonna Company, but it was a competition in part, at least, which, it was contended, was illegally conducted against rights which had been transferred in 1893. But, be that as it may, we repeat, patent rights may be conveyed partially or entirely, and the monopoly of use, of manufacture, or of sale is not one condemned by law."

Comparing the conclusions in the Creamery

Package case with those in the Bath-tub case, it appears that the real point at issue is the result which the contracts are meant to effect, taking into consideration all of the surrounding circumstances. Thus the Supreme Court has apparently declared that patent rights may be conveyed partially or entirely, when it does not appear that it is done for the purpose of restraining competition or effecting a monopoly which shall extend beyond the limits of the legal monopoly conferred in the patent.

Take, for instance, the Talking Machine case. There a talking machine manufacturer marketed its patented machines under a plan by which, in consideration of a "royalty," it granted only the "right to use" the machine, though it provided that, if all the conditions attached to this "right to use" were complied with, the user should become the owner of the machine upon the expiration of the patent. Under this plan, distributors and dealers had the "right to use" the machine only to the extent of demonstrating it, and in turn granting to such members of the public only as paid the stipulated "royalty" a non-assignable "right to use" the machine. The District Court, in 1915, held that this "royalty" was really only a

resale price, and that this "right to use" was in legal effect simply a sale of the machine; and the court declined to enforce the condition for payment of the stipulated "royalty" attached to this "right to use," on the ground that "the real purpose of the license is obviously to maintain the market for the talking machines at the present royalty." But the Circuit Court of Appeals, in 1916, reversed this decision, and held that this arrangement was valid and enforceable as a proper exercise of the manufacturer's patent rights.

Like other kinds of property, patent rights can be combined in the interest of efficiency. Thus a combination—according to the Government—of a concern manufacturing 60 per cent. of all the lasting machines made in the country with two other concerns, one manufacturing 80 per cent. of all the welt-sewing machines and outsole-stitching machines and 10 per cent. of all the lasting machines and the other manufacturing 70 per cent. of all the heeling machines and 80 per cent. of all the metallic fastening machines made in the country was held by the Supreme Court, in 1913, to be lawful under the anti-trust act.

"On the face of it," said the Supreme Court, "the combination was simply an effort after

greater efficiency. The business of the several groups that combined, as it existed before the combination, is assumed to have been legal. The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents. . . . We can see no greater objection to one corporation manufacturing 70 per cent. of three non-competing groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each. The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree. It is as lawful for one corporation to make every part of a steam engine and to put the machine together as it would be for one to make the boilers and another to make the wheels."

The system by which this shoe machinery combination allowed specially favourable terms to lessees who used this shoe machinery in groups was decided by the District Court, in 1915, to be lawful under the anti-trust act for substantially the same reasons just quoted from the Supreme Court. How the patent law creates such a "difference

between the commercial situation relating to patented articles and that relating to articles of general production" that the anti-trust act must recognize and allow for it was explained in this decision.

"The inventor seeks," said the court, "to displace by invention inferior methods, and such displacement is encouraged by giving to the patentee a free field for his invention and by giving him the right to offer it upon such terms as he may induce the public to accept. During the period of monopoly he may establish a goodwill which will give him after the expiration of his patents a formidable advantage in competition over imitative manufacturers. Frequently this goodwill and the development of his business may be such as to practically and lawfully exclude competition after the expiration of his patents. . . . The enterprise of the defendants in developing and occupying a field in this way rendered it impossible, of course, for any subsequent organization to have the advantages of an unoccupied field. . . . To say that this is due, in any substantial degree, to the fact that its leases run beyond the terms of patents, or because of the exclusive use, prohibitive, or cancellation clauses,

rests largely, if not entirely, upon assumption. . . . The clauses objected to are all subordinate and auxiliary to maintaining rights, which unquestionably belong to the defendants, to charge their own prices and to choose as customers those who will pay those prices."

WARNING NOTICES OF INFRINGEMENT SUITS

The Cash Register case, we have seen, illustrates the dangers which sometimes attend the sending of warning notices of infringement suits, and the use by salesmen of information concerning infringement suits. In the Creamery Package case, on the other hand, Justice McKenna said: "Patents would be of little value if infringers of them could not be notified of the consequences of infringement or proceeded against in the courts. Such action, considered by itself, cannot be said to be illegal." It is important, however, to note the qualification in the words "considered by itself." Here once more we meet our old friend, the thing which is perfectly legal in itself, yet which may be an important step in the proof of illegal restraint of trade when considered with all the surrounding circumstances.

The question as to the legality of threats of infringement suits, the publication of warning notices to the trade, and the use of alleged infringement—or, for that matter, adjudicated infringement—as a competitive argument, has been before the courts a great many times. Sometimes that question is the whole point at issue, and sometimes it is only one step in a complicated series of competitive acts. We may briefly examine two typical cases.

The first case, decided by the District Court at Milwaukee in December, 1913, involved two underwear manufacturers. One company owned certain patents for closed-crotch union suits which were in litigation. By an advertising campaign, rather than by resort to the courts, this company was vigorously defending what it believed were its rights. It sent out notices through the mails to the trade, warning dealers against selling the garments of certain manufacturers, which, it alleged, were infringing its patents, it published substantially the same warning notices in its trade-paper advertisements, and it instructed its sales force to use similar arguments in talks with dealers. The other company, one of the alleged infringing manufacturers, brought suit for an injunction,

on the ground that such tactics were not essential to the protection of the patents, but, on the contrary, were a means of intimidating the trade and wrongfully restraining competition. The court granted the injunction, and restrained the first company from continuing the practice.

The other case arose out of the famous Harrow litigation. This case was decided by the United States Circuit Court of Appeals, in 1903, and is worth quoting also because it points out one of the possible sources of danger to patent owners who do not manufacture the goods, but whose sole business is the issuing of licenses to others. The Circuit Court of Appeals said:

"Undoubtedly the owner of a patent is acting within his rights in notifying infringers of his claims and threatening them with litigation if they continue to disregard them, nor does he transcend his rights when, the infringer being a manufacturer, he sends such notices to the manufacturer's customers, if he does so in good faith, believing his claims to be valid, and in an honest effort to protect them from invasion. . . .

"When the manufacturer is financially responsible, is accessible, and his infringements readily provable, and when the patent owner is financially

able, and is one who makes it his sole business grant licenses, and is under a duty to his licensees to prosecute extensive infringers, the sending of such circulars to customers would seem to be merely a preliminary or cumulative measure, and the bringing of an infringement action the paramount and imperative proceeding. As, ordinarily, the patent owner would be prompt and zealous to assert his claims, if he halts and purposely procrastinates, and attempts to effect by threats and manifestoes that which he can compel by the strong hand of the law, a strong inference arises that he has not any real confidence in his pretensions. This inference becomes irresistible if he refuses to bring suit during a considerable period of time, when the alleged infringement is open, notorious, and defiant, and so extensive as to threaten destruction to his alleged exclusive rights.

"The *indicia* of bad faith are persuasive in the present case. It is impossible to read the communications warning the complainant's customers against selling its harrows, with which the defendant seems to have flooded the country, without being led to believe that they were inspired by a purpose to intimidate the complainant's customers and coerce the complainant, by injuring its

business, into becoming a licensee of the defendant. In view of its failure to bring an infringement action, under the circumstances which made an action practically compulsory, the defendant cannot shelter itself behind the theory that its circulars and letters were merely legitimate notices of its rights. We are satisfied that they were sent, not for the purposes of self-protection, but in execution of the defendant's threat to stop the complainant from building harrows by other means than legal remedies."

CHAPTER VII

SOME "TYING-CONTRACT" TRAPS

If there is one point, more than another, at which the average business man becomes certain that the anti-trust laws do not apply to *him*, it is when we begin to discuss the subject of "tying-contracts." It is the common view that a "tying-contract" must be the ingenious invention of super-subtle corporations of great wealth and immense power, and that Section 3 of the Clayton Act[1] was written for the direct purpose of getting at them. That purpose is one which the ordinary small business man is willing enough to applaud, and he generally gives no further thought to the subject of "tying-contracts," for, as he always says, "We don't use them in *our* business."

Now the probabilities are great that Mr. Business Man, having brushed aside Section 3 of the

[1] This section has been quoted in full in a footnote to a previous chapter upon "exclusive-dealer" agreements.

Clayton Act so lightly, will put on his hat forthwith and proceed directly to the office of his best and largest customer for the purpose of closing his best and largest contract for the year. After the usual amount of jockeying over prices, terms, and delivery dates, an order is signed in duplicate, and Mr. Business Man emerges with his copy safely buttoned up in his pocket. "Tying-contract"? Not a bit of it! Merely an order from the customer for a year's supply of a certain material or equipment at a certain price. Mr. Business Man agrees to furnish all the material his customer will need for a year, with a certain minimum quantity guaranteed. It is done every day; railroad companies buy that way; so do industrial corporations, institutions, municipalities, even Uncle Sam himself!

True—but let us examine Section 3 of the Clayton Act boiled down to its lowest terms. It shall be unlawful, it says, to make a contract of sale, or fix a price, or discount on or rebate from such price, on condition that the purchaser *shall not use or deal in the goods of a competitor of the seller*, where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Now if Mr. Business Man's

contract of sale, which prevents his customer from dealing with a competitor for a whole year, does *not* "substantially lessen competition or tend to create a monopoly," it is all right. But, as I have remarked before in a previous chapter, nobody on earth knows exactly what those phrases really mean. One thing is quite certain, however. Our hypothetical business man has made a "tying-contract" squarely within the meaning of the Clayton Act, unless he is saved by this quoted clause. As a matter of fact, the vast majority of business men *do* make "tying-contracts," of one kind or another, and the only thing that stands between them and the condemnation of the law is the possibility that the courts may put a liberal construction upon the phrase "substantially lessen competition or tend to create a monopoly."

MANY OTHER CONTRACTS IN THE SAME CATEGORY

Nor are those contracts for a year's supply the only kind of "tying-contracts" that business men are in the habit of making. There are, in addition, "exclusive-dealer" contracts,—already discussed in a previous chapter,—contracts for repair and spare parts, contracts for premiums and trading-stamps, contracts for dealers' helps, and

a whole galaxy of contracts for the sale of one line of goods at a certain price provided other goods are also purchased. Many manufacturers sell a piece of machinery or other equipment at a nominal price, upon condition that the supplies or material used with the primary purchase shall be purchased exclusively from them. That was the situation in the Mimeograph case which was decided by the Supreme Court, in 1912, before the Clayton Act was passed. In that case it was declared to be lawful for a manufacturer to sell a patented machine on condition that the purchaser of the machine should use it only with supplies bought exclusively from him. Some believe, however, that the passage of the Clayton Act has gone a long way toward overruling the decision in the Mimeograph case. Indeed the Federal Trade Commission is now prosecuting the very manufacturer whom the Supreme Court upheld in the Mimeograph case, and in the prosecution is contending that the very condition which the Supreme Court there sustained has since been made unlawful by the passage of the Clayton Act.

Cases under the Clayton Act are not very plentiful up to date, but such as have been decided are not reassuring so far as they involve "tying-

contracts." One extremely suggestive case involved the use of a patented button-setting machine. The points involved are sufficiently clear from the decision of the court, in which a condition somewhat similar to that involved in the Mimeograph case was held to be in violation of the Clayton Act.

"According to the allegations of the bill of complaint," said the court, "plaintiff is the owner of three patents for improvements in button-setting machines and attachments thereto. It is, and for several years has been, manufacturing and leasing or licensing shoe-button-attaching machines constructed under its patents, and, in so doing, is and has been engaged in interstate commerce throughout the United States. Prior to the enactment of the Clayton Anti-Trust Act, so-called, in October, 1914, plaintiff's machines were loaned or leased to users, including the defendant, on the condition that only its wire should be used in their operation. Attached to each machine so loaned or leased was a metal plate bearing the following inscription:

" 'This machine is the property of the Elliott Machine Company and is loaned to and accepted by the user to use wire furnished under the company's trade-mark only.'

"No other agreement than that stated upon the plate was made with defendant or other users. Plaintiff's wire, the use of which was thus required, was put up in coils. Each coil contained a sufficient amount of wire for one thousand operations of the machine, which was so constructed as to lock automatically upon the completion of each one thousand operations. For that reason, a key with which to unlock the machine was attached to each coil of wire. The wire and key were furnished by plaintiff to its customers for about eighty-five cents per coil, which included both the price of the wire and the royalty for the use of the patented machine to fasten one thousand buttons.

"Since October, 1914, plaintiff, believing that the further continuance and performance of its former contracts would be a violation of Section 3 of the Clayton Act, has notified the users of its machine, including defendant, that they will no longer be required to purchase or use its wire, and that a royalty of seventy-five cents must be paid for the use of each machine to make one thousand operations or to fasten one thousand shoe buttons. Plaintiff has continued to manufacture wire, but sells the same, without the key, for ten cents per coil, which is a fair price for the

wire alone without any royalty for the use of the machine.

"Defendant has purchased wire from plaintiff's agents at ten cents per coil and has continued to use the patented machine, but has refused to pay the royalty demanded. This suit is brought to restrain further alleged infringement of plaintiff's patents and for the usual accounting. Defendant's motion to dismiss is founded primarily upon the claim that Section 3 of the Clayton Act is not retroactive and cannot affect contracts, like the one here involved, made and entered into before its enactment. . . .

"The statute does not in terms except from its operation any agreements, or contracts, past, present, or future, and, in the absence of such exception, it is to be presumed that Congress intended to prohibit not only the making of future contracts, but also the further performance of past contracts of the kind specified."

Now, it is evident from this that the court considered the earlier form of contract a violation of the Clayton Act—in other words, the court believed that it *did* "substantially lessen competition or tend to create a monopoly." This contract tended to prevent competitors from selling

any wire to the users of this particular type of machine—not such a terribly serious restraint it would seem, yet serious enough to be held in violation of the Clayton Act. And if it substantially lessens competition to make a contract for the exclusive supply of wire to a particular button-fastening machine, what shall be said of an agreement to supply a railroad with all the brake-shoes that are needed for a year? What about an exclusive contract to manufacture letter-boxes for Uncle Sam's Post Office? What about the automobile manufacturer who agrees to make a certain kind of carburetor "standard equipment" for the coming year, and thereby shuts out competing carburetor manufacturers? What about the incandescent lamp manufacturer who contracts to furnish all the lamps needed by a factory, or an apartment house, or a school building? If those contracts "substantially lessen competition" they are illegal, and there's an end of it.

STATE LAWS AGAINST "TYING-CONTRACTS"

As a matter of fact, the Clayton Act does not stand altogether by itself so far as this particular prohibition is concerned. A number of States

have laws which contain somewhat similar provisions, and these laws have been construed by the courts at one time or another. Many people suppose that the courts will construe the Clayton Act in harmony with these decisions of the State courts, and it is therefore worth while to indicate briefly just how drastic those decisions have been. For example, a case arose, in 1905, under the Massachusetts law in which the defendant was a salesman employed by the Continental Tobacco Company to solicit orders from purchasers. The evidence tended to show that he sold tobacco to purchasers at list prices, agreeing to give them a trade discount of two per cent., and, if the bill was paid within ten days, a further cash discount of two per cent., and, if they handled the plug tobaccos of the Continental Tobacco Company exclusively—that is, handled and dealt in no plug tobacco made by any manufacturer other than the Continental Tobacco Company—to give them at the expiration of a stated period a further amount equal to six per cent. of the amount of their purchases during such period. The trial judge instructed the jury as follows:

"Upon all the evidence, if you are satisfied that the defendant, acting for the Continental Tobacco

Company, offered for sale to the person or concern named in either count of the indictment the plug tobacco made by the Continental Tobacco Company *upon more favourable terms if such person or concern should not sell or deal in the plug tobacco of any other person, firm, corporation, or association of persons*, it will be your duty to find the defendant guilty under any such count."

Upon this instruction the defendant was convicted of violating the Massachusetts law. The Massachusetts Supreme Court, however, held that this was too broad, and reversed the conviction. In a tentative sort of way, the court intimated that if, "under the guise of giving more favourable terms to those who were selling his employer's goods exclusively, the defendant had made the price to those who sold goods of others so high, in comparison with that to those who sold only his employer's goods, *as virtually to make it prohibitive to purchase except by those who sold his employer's goods*, the case would be very different" (italics added). Thereupon, the unfortunate defendant was promptly placed on trial again; and after a trial conducted this time along the lines indicated by the Massachusetts Supreme Court the defendant was again convicted, and

upon appeal the Massachusetts Supreme Court this time sustained the conviction.

Several years later, when the United States Commissioner of Corporations reported upon the American Tobacco Company—which meantime had succeeded to the Continental Tobacco Company's business—he found that the company in deference to this decision had given up the use of this arrangement in New England territory. And when the company was dissolved, in 1911, in the Government suit under the anti-trust act, the decree enjoined the companies into which it was divided from "refusing to sell to any jobber any brand of any tobacco product manufactured by it, except upon condition that such jobber shall purchase from the vendor some other brand or product also manufactured and sold by it; provided, however, that this prohibition shall not be construed to apply to what are known as 'combination orders,' under which some brand or product may be offered to a jobber or dealer at a reduced price, on condition that he purchase a given quantity of some other brand or product."

A harder case, that well illustrates the unexpectedness of the "tying-contract" trap, and the mischief that it causes wherever it obtrudes itself,

arose, in 1914, under the Texas law. There the parties entered into the following agreement:

"DALLAS, TEXAS, Oct. 30, 1912.

"This contract and agreement, this day entered into by D. M. Jones, acting for the Texas Ice and Cold Storage Co., hereinafter called first party, and H. C. Wood, hereinafter called second party, all of Dallas, Texas, witnesseth: That the first party agrees to sell the second party as much as six tons, or what his trade may demand, of ice per day, and as much more as the first party is able to supply, without conflicting with other arrangements, and the second party agrees to make all his purchases from the first party during the term of this contract, provided the first party is able to furnish same as above indicated. The price to be paid for all purchases during the term of this contract, which is one year beginning October 30, 1912, is three dollars ($3.00) per ton on platform, located at 2225 Cedar Springs St., of first party, unless the general market price of ice in the city of Dallas goes below said price, then in that event, during such time, the first party agrees to meet such price so long as first party operates their plant. [Here follow numerous provisions

relating to what shall be done in case of closing appellee's factory, the quality of ice to be furnished by appellee, and certain other mutual and reciprocal duties of both parties unnecessary to detail.] Witness our hands in duplicate.

"H. C. Wood,

"Texas Ice and Cold Storage Co."

Now study that contract carefully, and ask yourself whether you have not often entered into just such contracts as that! See the fairness of it: Wood gets six tons of ice a day for a year at a flat price, and, to the extent of the Ice Company's ability, gets *all* his ice for a season at the same price, and at the same time is absolutely protected against a decline in the market, for if the price goes down he pays only the market price; and for all this Wood is never obligated to take more than six tons of ice a day.

The court, however, with the Texas law before it, fastened upon the tell-tale phrases "what his trade may demand" and "agrees to make all his purchases . . . during the term of this contract," and refused to enforce the contract in a suit between the parties, and held the contract void on the ground that it "comes precisely within

the statutory definition of the acts denounced thereby, *since the declared purpose of the contract is to prevent the appellant from buying ice from any other person, firm, corporation, or association*" (italics added).

CONFLICTING DECISIONS AND HARD CASES

Manufacturers of dress patterns have had varying vicissitudes in their encounters with various anti-trust laws dealing with "tying-contracts." In Massachusetts the Supreme Court held, in 1909, that the Massachusetts law, under which the salesman of the Continental Tobacco Company was convicted as already described, did not invalidate a contract between the manufacturer and a dealer by which the dealer bought dress patterns from the manufacturer and retailed them in his store, although the contract expressly required the dealer "not to sell or permit to be sold on the premises . . . during the term of this contract any other make of patterns." This same manufacturer also had a similar contract sustained, in 1910, by the Wisconsin Supreme Court in the face of the anti-trust act of that State, although the court there rested its decision on the narrow ground that the patterns were patented.

In Texas, however, a similar contract was held, in 1916, to be in violation of the Texas law.

The trading-stamp people, whose business is vexed by unsympathetic legislation in a number of States, have also had experience with the "tying-contract" bogey. A trading-stamp concern operating in Massachusetts issued trading-stamps and books to dealers upon condition that the dealers should not use trading-stamps issued by any other concern. Under the Massachusetts law, with which we have become familiar, the Supreme Court held, in 1915, that this arrangement was illegal. Some years before, in Texas, another concern doing a trading-stamp business succeeded in slipping through the meshes of the Texas law on the ground that the Texas law related only to articles of merchandise, produce, or commodities, and that trading-stamps were none of these things but only "aids to commerce"! But this ingenious view was not favoured by the Massachusetts court.

Other cases in State courts could be cited to show that the construction of some of these laws leaves very little margin to the maker of a "tying-contract." How closely the United States courts in interpreting the Clayton Act will follow the

lead of the State courts in interpreting the State statutes is, of course, problematical, but cautious lawyers have already begun to advise that it is not safe to rely too confidently upon the saving grace of the clauses "substantially lessen competition," and "tend to create a monopoly." Certainly the nonchalance of some of the United States courts in disposing of these clauses in some of the cases of "tying-contracts" arising under the Clayton Act is disquieting enough to warrant great caution. In the Button-setting case we have already seen that the contract was declared to be void under this law without so much as a reference to these clauses. In the Shoe Machinery case, in 1915, the court, in advance of trial and, indeed, before the papers in the case had been served on the defendants, granted at the Government's request a temporary injunction, enjoining the defendants from enforcing the essential provisions of thousands of leases covering millions of dollars worth of shoe machinery in the factories of hundreds of shoe manufacturers scattered throughout the United States, simply upon the allegation of the Government that those leases contained provisions that were forbidden by the Clayton Act; and several days later, also in advance of trial and at

the Government's request, the court continued this injunction for the duration of the suit without so much as a syllable of discussion as to whether the clauses "substantially lessen competition" and "tend to create a monopoly" had any bearing on the question! True, the Government decided not to contest the appeal from this injunction, and the Circuit Court of Appeals vacated it and sent the suit before another trial judge for future proceedings; but what significance, if any, these clauses really have was not illumined by any of these rulings.

See how another court, in 1916, disposed of these clauses in another case involving a patent license: A company owning patents covering moving-picture projecting-machines licensed a manufacturer to make and sell these machines with the restriction that they be used solely for exhibiting film containing patented inventions controlled by the owner of the projecting-machine patents. This manufacturer went ahead, and made and sold these projecting-machines in accordance with his agreement with the company owning the patents, and attached to each projecting-machine a plate containing this license restriction. Then the patent on the film expired;

but the manufacturer went on just the same, making the projecting-machines and selling them with this license restriction, and in course of business one of them was bought and leased to a moving-picture exhibitor. Then the Clayton Act was passed. Sometime afterward, the company owning the patents covering the projecting-machines discovered that the moving-picture exhibitor was exhibiting film of a rival manufacturer upon that projecting-machine. Thereupon it sued the exhibitor for an injunction to stop him from breaking this license restriction. Now, of course, that license restriction was in violation of the Clayton Act, unless the fact that the projecting-machine had been bought and leased before the passage of the law made a difference, or unless the court believed that it did not "substantially lessen competition or tend to create a monopoly in any line of commerce." The court promptly decided that the date of the purchase and lease of the projecting-machine would not save the license restriction, and then took up the other point in the case.

"The testimony shows," said the court, "that the complainant has a monopoly under its patents of projecting-machines so that if no films not

manufactured by complainant can be used upon these machines, the complainant will obtain an absolute monopoly of the film business in spite of the fact that its patent on films has expired. If the prohibitions of the Clayton Act mean anything at all this case falls within them and the restrictions as to use of films other than complainant's with the projecting machines are therefore void."

DRASTIC RESULTS OF "TYING-CONTRACT" PROHIBITION

Where does this leave us? Consider the situation of a sewing-machine manufacturer, who leases his patented sewing-machine to garment-makers under a restriction forbidding them to use the sewing-machines with needles other than those furnished by the sewing-machine manufacturer. Special needles, manufactured only by the sewing-machine manufacturer, are necessary, let us assume, for the satisfactory running of the machine. Ordinary needles, such as can be purchased in the market at a cheaper price, not only impair the satisfactory running of the sewing-machine, but actually damage the machine itself.

Garment-makers are notoriously defective in mechanical intelligence, and irresponsible so far as financial liability goes, and withal appallingly parsimonious; which combination of traits insures that, without some such condition in the lease, none of those garment-makers would use the proper needles, and all the machines in which the manufacturer's capital is invested would soon come back to him ruined, and the loss would be entirely his. Every consideration of business sense, therefore, would seem to support the propriety of this condition. But where does it stand under the Clayton Act?

There is the law: "It shall be unlawful . . . to lease . . . machinery . . . whether patented or unpatented . . . on the condition, agreement, or understanding that the lessee . . . shall not use . . . supplies or other commodities of a competitor or competitors of the lessor . . . where the effect of such lease . . . or such condition, agreement, or understanding may be to substantially lessen competition or tend to create monopoly in any line of commerce."

Obviously, the makers of all those inferior needles are "competitors" of the sewing-machine manufacturer, so far as the needle business is

concerned. And obviously the sewing-machine is leased on the condition that their needles—which are "supplies or other commodities" of a competitor of the lessor—shall not be used on that sewing-machine. Since that is the only way the garment-maker would ever think of using any needles anyway, isn't there a violation of the Clayton Act right there? And isn't the sewing-machine manufacturer shut out from taking this natural means of insuring the preservation and satisfactory operation of all his leased sewing-machines? He certainly is, unless the courts can work out some meaning for "substantially lessen competition" and "tend to create a monopoly" that will save his lease.

Look a little further, and see how far these prohibitions of the Clayton Act carry. That sewing-machine lease also provides as a condition of the use of the machine that no repair parts or spare parts shall be used upon the machine except those furnished by the sewing-machine manufacturer. Who can dispute the reasonableness of this provision by which the sewing-machine manufacturer seeks to safeguard his investment in his leased machines? Turn back to the law, however. Isn't a repair part a "supply"? Isn't

a spare part a "commodity"? If it isn't a part of the sewing-machine that is covered by the sewing-machine manufacturer's patents, any pattern-maker can lawfully duplicate it, or make and sell something purporting to answer the same purpose. This pattern-maker, so far as the repair and spare part business goes, is clearly a "competitor" of the sewing-machine manufacturer. So doesn't it follow that this provision, also, violates the Clayton Act, unless the courts can work out some meaning for "substantially lessen competition" and "tend to create a monopoly" that will save this provision of the lease?

If the courts would only follow Judge Hough's view expressed, in 1915, in the Cream of Wheat case, and decide that "there is nothing in the Clayton Act to compel or induce courts to hold that the trade restraint referred to by this statute differs in kind, quality, or degree from that now held to be meant by the Sherman Act," there would be no difficulty. For however competition in the needle and the repair and spare part business may be affected by those provisions in the sewing-machine lease—whether competition be lessened "substantially" or insubstantially—there is abundant authority for the view that those provisions

would not be held to constitute a restraint of trade within the meaning of the Sherman Act. But the Government takes the view, and in the Shoe Machinery case under the Clayton Act it is now contending with all its might, that the Clayton Act sets up a stricter standard, and forbids a much less restraint of competition, than does the Sherman Act, and in support of that view the Government claims to derive great encouragement from the decisions in the Button-setting and the Projecting-machine case.

Now it is hardly consistent that the Government should institute proceedings against any manufacturer on the ground that he is in the habit of making "tying-contracts" with his customers. For, as I have pointed out, the Government is itself a party to such contracts in connection with almost everything it buys for its own use. "Tying-contracts" may, however, represent very important bits of evidence when taken in connection with other acts in an anti-trust prosecution. Furthermore, the passage of the Clayton Act has multiplied the possibilities of getting into trouble through actions brought by individuals who may consider that they have been injured.

HOW THE LAW MAY BE PRACTICALLY APPLIED

There are, in fact, five ways by which the Clayton Act may be invoked against business men.

First, the Government may start an action through the Department of Justice. The probability of that is not entirely remote, even when there is involved only a question of "tying-contracts." The Government is now prosecuting a shoe machinery company on a charge based wholly upon a system of leases which are alleged to be in violation of Section 3 of the Clayton Act; and "tying-contracts" have figured prominently in a number of consent decrees which the Government has obtained. For example, we find in the decree against a coal-tar company, "that said defendants and each of them are forever enjoined and prohibited from making or enforcing any contract whereby a purchaser of one line of material, such as tarred felt, shall be compelled to purchase from defendants or any allied interest any proportion of other material."

Second, a system of "tying-contracts" may be made the basis of a proceeding by the Federal Trade Commission. That also is hardly a remote possibility, since the Commission is already

prosecuting one such case, and has investigated and induced the discontinuance of "tying-contracts" in several others.

Third, an individual who deems himself injured by such contracts may sue for threefold damages. There we are getting closer home, for such an individual need not wait until some branch of the Government has been set in motion, but may go out and hire any lawyer on a contingent basis and begin suit, whenever and against whomsoever he wishes.

Fourth, the same individual may sue for an injunction to prevent the carrying out of the contract. This is something which, until 1914, only the Government could do. But by the Clayton Act this extraordinary remedy is thrown open to every one.

Fifth, the Clayton Act may be invoked as a defence against actions brought to force the completion of the contract or the payment of the debt based on the contract.

The possibilities contained in the last three methods of approach have not been thoroughly appreciated by business men. Let us assume that I am a dealer in office equipment, and have the exclusive representation for a certain line of filing cabinets. I have an understanding with the manu-

facturer that I am not to handle competing cabinets, in return for which I have the exclusive sale of his cabinets for my territory. In the course of time I become careless in my business methods, and am slow about making remittances for my purchases. In short, I fail to live up to my end of the agreement, and the manufacturer takes his line away from me. One of my competitors is now the manufacturer's "exclusive-dealer," and the manufacturer begins to press me for the thousand odd dollars I owe him on past transactions.

Let us further assume that I am inclined to be nasty about it, and that I establish relations with a rival office-equipment manufacturer, and also retain a lawyer who has given up ambulance-chasing for the more profitable fields of labour opened up by the Clayton Act. The manufacturer brings suit against me for the thousand odd dollars I owe him. I reply by stirring up the United States Attorney and the Federal Trade Commission to start Government proceedings, and by stirring up the rival office-equipment manufacturer to file a suit under the Clayton Act for three times the damages he may claim to have sustained by reason of the illegal "tying-contracts," first with myself, and later with my competitor; and also stir

him up to start a suit to obtain an injunction restraining any further enforcement of the latter contract. Then I also defend the suit brought against me, by claiming that my debt of a thousand odd dollars is not collectable because it was incurred in the course of an illegal transaction. My original contract with the manufacturer was illegal under Section 3 of the Clayton Act, I say, and shall he ask the courts to enforce an illegal contract? Unless the manufacturer can show that his "exclusive-dealer" system does not "substantially lessen competition," he runs an excellent chance of losing his thousand odd dollars, and of having either the United States Attorney or the Federal Trade Commission or his rival get an injunction against him, and of his rival also getting damages against him in the bargain! Some caustic observations with respect to my moral standing in the business community and the obvious motives which prompted my action might, of course, be made; but courts are the interpreters of the law, not of morals.

THE CLAYTON ACT AS A "DEFENCE"

Nor is my illustration altogether fanciful. The anti-trust law has been invoked more than once as

a defence against suits for justly incurred debts, and the principle has even been successfully used as a defence against actions for unfair competition. For example, the Coca-Cola Company, in 1915, sued in a United States court to enjoin an ex-bottler of coca-cola from using the Coca-Cola Company's trade-mark after his exclusive contract had expired. For apparently good and sufficient reasons the Coca-Cola Company had taken the bottling privilege away from the defendant in this case, and had given it to somebody else. The defendant claimed that he still had a stock of genuine coca-cola syrup on hand, which he continued to put out under the coca-cola trade-mark, The company brought suit to enjoin such unauthorized use of its trade-mark. In denying the injunction, the court said:

"The real purpose of this suit, as shown from the record, is not to protect the trade-mark of plaintiff from infringement by defendants in palming off on the public their spurious or inferior goods under the trade-mark, and in the place of the beverage coca-cola as made from the syrup of plaintiff, to the consequent injury and damage of plaintiff; but the purpose is to secure the protection of the law to enforce and carry out the monopoly it has planned

and enjoys in the manufacture and sale of non-patented personal property through the medium of the exclusive-contract system, under the guise of affording protection to its registered trade-marks."

In short, even if we dismiss from our minds the possibility of Governmental attack based on "tying-contracts" under Section 3 of the Clayton Act, the broad opportunity for individuals to bring suits, or to use the law as a defence, is somewhat disquieting.

It has been the custom, for instance, in some lines of men's wear for manufacturers to give show-cases, display racks, and other forms of dealer helps to those retailers who would agree to handle their lines exclusively. Unquestionably such agreements are illegal if they "substantially lessen competition or tend to create a monopoly," and the dealers can plead their illegality as a defence in all suits arising directly from those contracts. It is conceivable that the manufacturer might not even be able to collect the money due him for his merchandise, and thus the Clayton Act might be made a cloak for what most business men would regard as actual fraud. The only loophole is the "substantially lessen competition or tend to create a

monopoly" clause, and, judging from such information as is available, this way of escape will first have to be paved by judicial decisions.

The whole subject of "tying-contracts" may be summed up as follows: By the passage of the Clayton Act, Congress has placed the suspicion of illegality upon a very large group of common business transactions. Many of those transactions are necessary for the continuance of business relations. Even the Government of the United States has not found it profitable to transact its business without "tying-contracts" of one form or another. But any contract for goods, wares, or merchandise which, by its operation, prevents the use or sale of competing products, is illegal unless it can be shown that it does not "substantially lessen competition or tend to create a monopoly." By Section 4 of the same Act it is provided "that any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." By Section 16 it is provided that any person, firm, corporation, or association which is *threatened* with loss or damage by a violation of the

anti-trust laws—specifically including Section 3—may sue for an injunction. Furthermore, business men are always confronted with the fact that an illegal contract is non-enforceable. Debts contracted in pursuance of an illegal contract are not collectable by legal means. Any contract of the sort specified may be outlawed, therefore, unless a court shall decide that it is so insignificant as not to "substantially lessen competition or tend to create a monopoly."

CHAPTER VIII

THE PROBLEM OF "PRICE-CUTTING"

START the discussion of "price-cutting" in any convention of sales-managers of popular and nationally marketed specialties, and the air will soon be filled with impassioned oratory, philippics against the wickedness of "price-cutting" mingling with jeremiads over the trade devastation it has caused, while strident above the tumult of denunciation, invective, and objurgation will rise from time to time the words "pirate," "cutting-off," "price maintenance," "department stores," "mail-order houses," "chain stores," and "the Stevens Bill."

Start the discussion of "price-cutting" in the United States Attorney's office—but no, you would never be so foolish as that! Listen to the United States Attorney when *he* starts it—and three times out of five you will hear him begin by questioning the manufacturer to see whether the various manufacturers in his line are cutting each other's prices, and whether there has been any agreement, writ-

ten or oral, verbal or tacit, expressed or implied, direct or indirect, in any way, shape, form, or manner regarding prices. If he exhausts this line of inquiry without finding anything, you will next hear him inquire whether the manufacturer has any agreement with his dealers regarding resale prices. The thoroughness with which the United States Attorney will search for anything that can be twisted into an agreement—written, oral, verbal, tacit, expressed, implied, direct or indirect—will impress you. And when, at the close, he tells the manufacturer that he is going to send an investigator to the manufacturer's office tomorrow morning to look through the manufacturer's letter files, salesmen's reports, sales charts, scrap-books, and business records for the past four or five years, you will conclude that United States Attorneys are suspicious by nature and persistent to the point of obstinacy!

GOVERNMENT'S VIEW OF "PRICE-CUTTING"

Perhaps, if you tarry after the anxious and bewildered manufacturer has departed, the United States Attorney will let you see the Government's brief in the Watch-case suit, which has

been referred to in an earlier chapter; and there, in the course of the discussion of "price-cutting," you will read denunciation, invective, objurgation, philippics, and jeremiads that would strike dumb a whole convention of the sales-managers.

"Defendants' attack on the 'price-cutter' as an 'undesirable,'" said the Government in the Watch-case suit, "is a direct attack on the freedom of competition which the anti-trust act is intended to preserve. Price-cutting is nothing more and nothing less than competition in selling, and it is one of the only two ways in which the consumer gets the benefit of competition, the other being if economy in production is carried to the consumer. It will not do to assail competition in selling by the use of adjectives or designating it as 'secret rebating' or 'underhand price-cutting,' etc. . . . A 'system' by which prices in resale are controlled and fixed is condemned. . . . Nor does it make any difference whether the goods sold are of one or several manufacturers. Such system is against public policy, whether done in combination or rigged up by a single manufacturer. . . .

"The price-cutter is the fighting representative of those who still believe in being permitted to

run their own business without external interference. This court has recognized his true value. The 'price-cutter' is the sole representative in the trade who persists not only in believing but in acting as though the anti-trust act actually preserves for him freedom in the direction and conduct of his own business. . . . Eradicate all price-cutting . . . and you eradicate at that moment all real competition and leave the Sherman Law and its legislatively declared policy of preserving conditions for free competition an absolute nullity."

Now, there is an explanation of the Government's point of view; but in order to understand it you must go back to ancient history and to fundamentals.

The kind of "price-cutting" that first obtruded itself upon the attention of the lawyers and the judges charged with the enforcement of the anti-trust laws was the "cutting" by one manufacturer of his own prices below those of his competitor-manufacturer. This kind of "price-cutting" was often followed by a period when all the competing manufacturers were in a secret agreement to maintain prices, and there was no "price-cutting" between them at all. Then, eventually, this

secret agreement always broke up, and as soon as it did so, this kind of "price-cutting" began again. So that lawyers and courts came to look with suspicion upon those periods when there was no "price-cutting," and to view with equanimity, as proof that no secret agreement existed to maintain prices, those periods when there *was* "price-cutting." For agreements between competing manufacturers to maintain prices were forbidden by the anti-trust laws, and being always secret were always hard to prove; and this kind of "price-cutting" came generally to be regarded as the only infallible evidence that no such secret agreement existed.

It is hardly necessary to say that this is *not* the kind of "price-cutting" meant by the sales-managers to whom I have referred, nor the kind of "price-cutting" which I intend to discuss in this chapter. The kind of "price-cutting" I mean is the "cutting" by dealers below the manufacturer's designated standard resale price on goods that throughout the trade, from the manufacturer through wholesalers and retailers to the ultimate consumer, are marketed under some popular and well-accepted identifying mark—be it a brand, or a trade mark, or a publisher's imprint—that

distinguishes these goods from all others of the same kind and puts behind them as a selling force the manufacturer's own reputation and business responsibility. This is the "price-cutting" I mean. And I believe—as Mr. Justice Holmes strongly intimated, in his dissenting opinion in the Dr. Miles case that I shall soon discuss—that it is because lawyers and courts have so persistently kept in mind the peculiar associations of the other kind of "price-cutting" that so much difference of opinion now exists between them and the men who are distributing popular branded goods country-wide upon the reputation and responsibility of their manufacturers.

EARLY "PRICE-CUTTING" CASES

Some excuse was certainly afforded for this misapprehension in one of the earliest cases involving an agreement in respect of resale prices that was passed on by the Supreme Court. There, more than thirty wall-paper manufacturers formed a combination comprising 98 per cent. of the production and sale of wall-paper in the entire country, and made agreements with wall-paper jobbers requiring them to patronize exclusively the

members of the combination and to sell the goods purchased at prices fixed by the combination. Jobbers who refused to enter into this agreement were not to be supplied with wall-paper. Prices were promptly raised both to the jobbers and to consumers. "A more complete monopoly in an article of universal use," said the Supreme Court, in 1909, "has probably never been brought about." The court held the agreement to be wholly in violation of the anti-trust act, and refused to sustain any part of it.

Now the Supreme Court, before this, had already said that nothing in the copyright act gave publishers any peculiar advantage in fixing resale prices. The publisher of a book called *The Castaway* printed in each copy after the copyright notice the following:

"The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price and a sale at a less price will be treated as an infringement of the copyright."

A department store bought copies of the book, and with full knowledge of this notice proceeded to advertise and sell them for 89 cents apiece. The Supreme Court refused to stop them, holding that there was nothing in the publisher's conten-

tion that the copyright gave the publisher the right to an injunction. The court in that case made a good deal of the fact that copyrights are different from patents. This led many lawyers and business men to believe that in the patent law there was some legal support for resale price arrangements, and numerous arrangements were accordingly devised on this basis. This tendency was increased by the decision of the Supreme Court, in 1911, in the Dr. Miles case, where goods that were neither copyrighted nor patented were marketed under resale price agreements.

SUPREME COURT AND DR. MILES CASE

In that case the Dr. Miles Company marketed its medicinal preparations—which were put up under secret formulæ—by consigning them to wholesalers under contracts to resell only to designated "retail agents" of the company and only in accordance with a schedule of prices prescribed by the company. The "retail agents," in turn, were bound by contracts with the company to sell only in accordance with a schedule of prices prescribed by the company. The Supreme Court held that "the so-called 'retail agents'

are not agents at all either of the complainant or of its consignees, but are contemplated purchasers who buy to sell again, that is retail dealers"; and then proceeded to discuss the bearings of the whole arrangement.

"It is, as we have seen," said the Supreme Court, "a system of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers, and thus to fix the amount which the consumer shall pay, eliminating all competition. The essential features of such a system are thus described by Mr. Justice Lurton (then Circuit Judge) . . .: 'The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less

than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition has been brought about.' "

"But it is insisted," the Supreme Court continued, "that the restrictions are not invalid either at common law or under the act of Congress of July 2, 1890 . . . upon the following grounds, which may be taken to embrace the fundamental contentions for the complainant: (1) That the restrictions are valid because they relate to proprietary medicines manufactured under a secret process; and (2) that, apart from this, a manufacturer is entitled to control the prices on all sales of his own products."

The Supreme Court then discussed with great care the difference in legal status between patents and secret processes, and held that no special advantages, so far as the point under discussion was concerned, pertained to secret processes, re-

marking sententiously that this case "lies outside the policy of the patent law, and the extent of the right which that law secures is not here involved or determined." Then the court took up the company's second contention.

"The basis of the argument appears to be," said the Supreme Court, "that, as the manufacturer may make and sell, or not, as he chooses, he may affix conditions as to the use of the article or as to the prices at which purchasers may dispose of it. The propriety of the restraint is sought to be derived from the liberty of the producer.

"But because a manufacturer is not bound to make or sell, it does not follow that in case of sales actually made he may impose upon purchasers every sort of restriction. Thus a general restraint upon alienation is ordinarily invalid. 'The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraints in the alienation of articles, things, chattels, except when a very special kind of property is

involved, such as a slave or an heirloom, have been generally held void.' . . .

"Nor can the manufacturer by rule and notice, in the absence of contract or statutory right, even though the restriction be known to purchasers, fix prices for future sales. It has been held by this court that no such privilege exists under the copyright statutes, although the owner of the copyright has the sole right to vend copies of the copyrighted production. . . .

"It will hardly be contended, with respect to such a matter, that the manufacturer of an article of commerce, not protected by any statutory grant, is in any better case. . . . Whatever right the manufacturer may have to project his control beyond his own sales must depend, not upon an inherent power incident to production and original ownership, but upon agreement.

"With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circum-

stances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy. . . ."

SUPREME COURT'S VIEW OF "PRICE-CUTTING"

"The present case is not analogous to that of a sale of goodwill, or of an interest in a business, or of the grant of a right to use a process of manufacture. The complainant has not parted with any interest in its business or instrumentalities of production. It has conferred no right by virtue of which purchasers of its products may compete with it. It retains complete control over the business in which it is engaged, manufacturing what it pleases and fixing such prices for its own sales as it may desire. Nor are we dealing with a single transaction, conceivably unrelated to the public interest. The agreements are designed to maintain prices, after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them.

"The bill asserts the importance of a standard retail price and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established

retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them and not to the complainant. It is through the inability of the favoured dealers to realize these profits, on account of the described competition, that the complainant works out its alleged injury. If there be an advantage to a manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavoured to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system.

"But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They

are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. . . . And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

I have quoted the Supreme Court's decision in the Dr. Miles case to this length because it best states the present unsympathetic point of view of the Supreme Court and of the Government toward resale price arrangements. Two years later, in 1913, in the Sanatogen case, the Supreme Court finally dashed the hopes encouraged by its earlier remarks that had seemed to indicate an exception in the case of patents; and to the dismay of lawyers and business men who had considered the patent law a safe refuge for resale price arrangements, the Supreme Court held in the Sanatogen case that a patentee cannot lawfully limit by

notice the price at which future retail sales shall be made of patented articles sold by the patentee to jobbers and by them sold to retailers. The lower courts have since made some distinctions and refinements upon the doctrine of the Sanatogen case, to which reference has already been made in an earlier chapter in the course of discussing the scope of patent protection; but so far as unpatented articles are concerned, the Dr. Miles decision still stands in undiminished integrity.

Some time back I said that for an understanding of the point of view of the Supreme Court and of the Government regarding "price-cutting" and resale price arrangements we must get down to fundamentals; and perhaps as good a place as any to do this is right here. Here, then, I shall drop, for a time, my character of chronicler of wise legal saws and modern litigated instances, and assume that of a manufacturer of a popular-branded article facing this problem of distribution as it is presented to him in the marketing of his own specialty.

HOW BRANDED AND UNBRANDED GOODS DIFFER

Manufacturers of popular-branded goods—by which, let me repeat, I mean goods marketed

throughout the trade, from the manufacturer through wholesalers and retailers to the ultimate consumer, under some popular and well-accepted identifying mark, be it a brand, or a trade mark, or a publisher's imprint, that identifies these goods, and puts behind them as a selling force the manufacturer's own reputation and business responsibility—have been setting in motion, during recent years, some entirely new combinations of economic forces. The result is that, so far as the economics of their distribution are concerned, popular-branded goods are today just as different from unbranded goods, or goods of little known brands, as fish is from fowl.

In the marketing of unbranded goods, or goods of little known brands—both classes belong together and from now on will be referred to as "unbranded goods"—the selling force of the manufacturer's own reputation and business responsibility begins and ends with the manufacturer's own immediate customers, and is always a more or less local affair. These customers, all wholesalers, and all more or less expert judges, weigh and consider the price and quality of these unbranded goods, and the manufacturer's local standing for reliability and good service; and if these considerations

finally satisfy them, they decide to buy the goods. Beyond the transaction of selling his unbranded goods to the wholesalers, none of the elements in the manufacturer's personal equation ever figure. From this point on, it is the wholesalers, the middlemen, the dealers, and the retailers who undertake all the labour of selling these unbranded goods, and all the responsibility for their quality, reliability, and good service.

Thus, in competition with each other, the retailers, for instance, sell these unbranded goods to the large and inexpert audience of ultimate consumers. Into this transaction with the consumer there enters little of reputation for reliability and good service; and what does enter is not of the manufacturer, nor of any of the wholesalers, middlemen, or dealers through whose hands the unbranded goods have passed, but only the reputation of the retailer himself. The manufacturer of these unbranded goods is not known in the transaction.

The only selling force behind these unbranded goods, in the sale to the consumer, is the quality which they may show upon superficial inspection, and the retailers' own personal equation.

Thus it runs, in the case of unbranded goods,

down the entire line of trade, from the first wholesaler who buys the goods from the manufacturer, down to the last retailer that parts with them to the ultimate consumer. Beyond the first step, the manufacturer is wholly unknown; and the middlemen and dealers, whether wholesalers or retailers, are at each step selling these unbranded goods without any help from the manufacturer's reputation for reliability and good service or any of the other elements in the manufacturer's personal equation.

TREATING THE MANUFACTURER AS PRINCIPAL

No other course, indeed, in the case of unbranded goods, is ever possible. For since the goods are not identified by known brands the manufacturer can not, except in dealing with his immediate customers, ear-mark the goods among all the goods of the same general class, or differentiate them from rival goods, or in any other way single them out, and vest them with the selling power of his own personal equation. The manufacturer of unbranded goods, therefore, cannot have, except in a remote sense, any interest in the unbranded goods after they have left his hands.

For since he is unknown in all subsequent sales and resales, neither he nor his reputation plays any part in them whatsoever. Besides the entire absence of the manufacturer's personal equation in every transaction involving these subsequent sales and resales of unbranded goods—and resulting directly from this absence—there is, in each such sale and resale, always an unpleasant degree of ignorance on the part of the purchaser as to whether the unbranded goods are really of good quality and worth the price. Beyond what superficial examination and comparison with other goods may show, none of these purchasers has any basis to go on, except the reputation for reliability and good service of the immediate dealer from whom he buys. For since there is no identifying brand, and the manufacturer is unknown in the transaction, the manufacturer's reputation for reliability and good service is, of course, unknown, and therefore can not count.

Now consumers never quite like to buy in the darkness which the lack of a brand throws over the sale of all unbranded goods. Consumers have a very legitimate and reasonable curiosity regarding the makers of the goods they buy. In the distribution of any kind of goods, there are, in

the business sense as distinguished from the legal sense, only two principals: the original maker and the ultimate consumer. Wholesalers, retailers, dealers, and middlemen, in this business sense, are really only agents. Consumers, instinctively, when weighing the claims of any article in respect of quality and price, send their minds back past the retailer, and past the wholesalers, dealers, and middlemen who have preceded him, and think of the manufacturer as the real party responsible for the quality of the article, and the real principal in the transaction of purchase which they are contemplating. Whether the article be an automobile or a package of biscuit, it is the manufacturer's name, not the retailer's, that the consumer first looks for when contemplating a purchase. If there is no brand—or if the brand is unfamiliar, and conveys no associations to the consumer—then the consumer's curiosity is baffled, his instinct to pin responsibility upon the manufacturer is defied, and the identity of the party whom the consumer feels is really the principal behind the retailer is wholly concealed.

Dissatisfaction with these obvious disadvantages of unbranded goods has increased with the passing of years. Variance in the quality of the goods,

lack of information as to who is responsible—for, lacking a brand by which to identify the goods with some particular manufacturer, responsibility for variance in quality can not be fixed—and the resulting waste of time and frequent disappointment in testing goods upon each new purchase, are all added considerations that have led to the evolution of an alternative method of marketing.

Formerly soap was simply soap. The grocer bought it in bulk, and cut off bars in any size that the consumer desired. No two lots were the same. Since the soap bore no identifying mark, and the grocer dealt only with wholesalers, not even the grocer knew whose soap he was selling. Except by superficial examination, and by reliance upon the promises of the grocer who himself had no definite knowledge of the matter, no consumer when he was buying soap could tell whether he was getting good soap or bad. Then came Babbitt, who made soap that he was proud of, and wrapped it in distinctive packages, and marked it with a brand that everywhere identified it and guaranteed it, and proceeded to market it all over the country. People everywhere began to buy soap by asking for Babbitt's. Then other soap makers began to do the same thing.

Brands and trade-marks had been known before, but their value in extending the distribution of standard goods to the ends of the earth were never fully realized until our own day. Now branded goods are essential in every plan of country-wide distribution.

ECONOMIC FORCES IN POPULAR BRANDS

In terms of distribution, the difference between unbranded goods and popular-branded goods is this: Unbranded goods are backed only by the selling force of the reputation and personal equation of a dealer trying to pose to the purchaser as a principal, while the purchaser is instinctively regarding him as only an agent. Popular-branded goods, however, are backed by the combined selling forces of the reputation and personal equation of the identified manufacturer, whom the purchaser regards as the real principal with whom he is dealing, and also of the reputation and personal equation of the dealer, whom the purchaser regards, and prefers to treat, as really only an agent between the manufacturer and himself.

In the marketing of popular-branded goods the selling force of the manufacturer's own reputation

and responsibility begins, as in the case of unbranded goods, with the manufacturer's immediate customers; but instead of stopping there, it continues down through all the wholesalers, middlemen, dealers, and retailers until the last retailer has parted with the goods to the ultimate consumer. After the wholesalers, or the middlemen, or the dealers, or the retailers have bought the popular-branded goods, and they in turn offer them to their respective customers, they appeal to audiences that are all in a very different mood from those which judge unbranded goods. If the brand is firmly and favourably fixed in the popular mind, the customer is measurably convinced at the outset regarding the quality of the goods and the reputation and responsibility of the manufacturer. If to this knowledge be now added knowledge of the standard price at which the goods may be bought of any dealer, and this standard price is also measurably satisfactory, then practically every factor that is determining in a sale is already favourably active. Wholesalers' salesmen do not need to call so frequently upon retailers, nor to exert so much effort in obtaining their orders. Retailers are relieved from the necessity of spending so much time assuring consumers regarding the price

and quality of popular-branded goods. The manufacturer counts in each transaction of sale and resale, and his reputation and personal equation are the chief selling forces that at every stage sell popular-branded goods. Every dealer benefits equally in this selling force added by the manufacturer. For every purchaser knows that no matter from whom he buys these popular-branded goods he will receive the same quality for the standard price. Competition, therefore, becomes transformed, and vastly increased, and expands into national dimensions. Every popular brand of goods competes with all unbranded goods of the same general class, and with all other brands of goods of the same general class. Prices on any popular brand of goods are prevented by this competition from being too high. For any excess in price of one brand over that of unbranded goods or other brands of goods of the same general class cannot exceed the sum that the consumer will be willing to pay for this insurance of quality and reliability.

The pull of the consumer's reliance, that draws popular-branded goods swiftly through the hands of wholesalers, middlemen, dealers, and retailers and into the hands of the ultimate consumers,

and the preconceived conviction of purchasers in favour of the goods at every stage along the line, and the fortification of innumerable places where the purchasers' whim might otherwise break down the line—achievements all of which the manufacturer himself, unaided except by his own labour and capital, creates by aggressive popularization of his brand—all these are forces as real and potent as physical laws. Collectively, they are the forces that constitute "goodwill." While the manufacturer's popularization of his brand is today frequently accomplished through advertising the particular merit of the goods, this is only because advertising—as contrasted with the word-of-mouth salesmanship of the manufacturer's salesmen and the dealers' clerks—is the least costly way by which the manufacturer can increase distribution soon enough, and to such an extent, as will enable him to expand his production and to obtain the lower costs that alone can justify the price at which he markets his goods. The travelling-men's payrolls, railroad tickets, and hotel bills, the solicitors' wages and expense accounts, the store and show-room rents, the over-head charges and the clerk hire that would be needed in order to offer for sale any specialty

simultaneously in every city, town, and hamlet in the country so that every dealer and consumer in the United States could see it would infinitely exceed the cost at which practically the same result can be accomplished through country-wide advertising in newspapers and periodicals and other mediums of local and national circulation.

REAL SELLER NAMES THE SELLING PRICE

Through some or all of these means, however, and always through unceasing delivery of quality, the manufacturer of branded goods must vest his brands with goodwill, before he can harness to them this pull of the consumer's reliance or make the selling forces of his own reputation and responsibility the factors that shall play the chief part in the sales and resales of his branded goods down to the final sale of the last retailer to the ultimate consumer.

Here, then, is the elemental reason why the manufacturer of popular-branded goods, who has achieved all this, feels the necessity, and claims the right, to fix the standard price beyond his immediate customers: It is the manufacturer's reputation, responsibility, personal equation, and

goodwill, and not the wholesaler's, or middleman's or dealer's or retailer's efforts, that constitute the chief selling force in each successive sale and resale. In the marketing of popular-branded goods, middlemen and dealers, in the business sense as distinguished from the legal sense, are really only agents of the manufacturer. The manufacturer is the real principal, and the real seller of the goods; and to the extent that he is the principal and the seller, the manufacturer claims the right that everyone else has always had to fix the price of his own goods to his own customers.

The manufacturer of popular-branded goods has an interest in the success of his goods to the extent of the entire volume of sales of all the dealers that handle them. Each dealer has an interest in the success of those goods only to the extent of the relatively small quantity he handles. The manufacturer of popular-branded goods has his constant expenses for advertising and solicitation to increase the volume of their distribution. Middlemen and dealers in those goods do not have this burden, though it operates for their benefit. Nor is this extra cost passed on to the public. For the standard price on every popular brand of goods is first put at the figure which will

take off the volume necessary in order to keep the manufacturer's costs low enough to justify the price. Increased volume thus lessens costs and permits increased quality for the same standard price; and this in turn increases volume again, with the result that the quality delivered to the consumer is several times compounded. The standard price on popular-branded goods does not tend to keep the manufacturer's profit per article high. Competition from unbranded goods and from other brands of goods of the same general class, as we have already seen, prevents that. The function of the standard price, in the distribution of popular-branded goods, is simply to enlarge the distribution, and to keep it large through continual fostering of the consumer's reliance; and thus, while keeping the manufacturer's profit per article low, to keep the number of articles sold, and therefore the number of these low profits, just as plentiful as the consumer's demand will dictate. Since the manufacturer of popular-branded goods assumes the chief part of the salesmanship in each successive sale and resale of the goods, and the consuming public does not have its standard price increased—for competition, as we have seen, prevents this—it would seem to be in the public

interest to permit the manufacturer to use this reasonable means to expand his business for the sake of more effective competition with his rivals.

"PRICE-CUTTING" OF BRANDED GOODS ANALYZED

Turn back, now, to what the Supreme Court said in the Dr. Miles case: "The present case," said the court, "is not analogous to that of a *sale of goodwill, or of an interest in a business. . . . The complainant has not parted with any interest in its business. . . . It has conferred no right by virtue of which purchasers of its products may compete with it.*" Had the arrangement in the Dr. Miles case been analogous to any of these things, the court seems to concede that then it *might* have fallen within the category of recognized reasonable and lawful restrictions.

In all humility, and with all deference to the great authority of the Supreme Court, it is submitted that *some* resale price arrangements—not perhaps the Dr. Miles company's, of which I know nothing beyond the court decisions, nor by any means *all* resale price arrangements, but *some—are* analogous to all the things mentioned

by the Supreme Court in the passage just quoted, and can be so demonstrated.

The dealer in popular-branded goods, as we have seen, has in his own business all the aid of the *goodwill* which the manufacturer's popularization of his brand has effected. This goodwill, of course, is the manufacturer's own property. It is a real, genuine and substantial *interest in his business.* To complete the analogy which the Supreme Court disputed: Has not the manufacturer of the popular-branded goods *parted with this interest in his business?* Has he not conferred a right by virtue of which *purchasers of his products may compete with him?*

This brings us directly to the subject of "price-cutting."

"Price-cutting" of unbranded goods necessarily can affect only the small field and narrow interest comprising the "price-cutter's" own trade. Since the goods are unbranded, and therefore not readily comparable with others of the same general class, the "price-cutter's" competitors have almost as good an opportunity as before to avail of their own reputation, personal equation and goodwill to preserve the confidence of their trade in the quality and prices of the goods on their shelves.

No verdict expressed by the "price-cutter's" customers, or the customers of his competitors, can, therefore, possibly prejudice other dealers handling the same goods elsewhere. For there is no ready way by which these unbranded goods can be identified with the other unbranded goods that the "price-cutter" is sacrificing. Nor can it embarrass the manufacturer of the unbranded goods. For he is unknown in the transaction of the retail sale, and, indeed, in any sale beyond the sale which the manufacturer himself made to the middleman. "Price-cutting" of unbranded goods, therefore, has substantially no ulterior bad effects.

"Price-cutting" of popular-branded goods, however, affects not only the "price-cutter's" trade and competitors but also everyone trading in that particular brand, up as high as the manufacturer himself and down as far as the ultimate consumer. As regards the economic forces involved in their distribution, unbranded goods and popular-branded goods, we have already found, are utterly different. Since the latter are all ear-marked and standardized, and their price and quality have been familiarized widely by known brands, there can be no question of their quality nor of the manufacturer's reliability; and no appeal

by the "price-cutter's" competitors to their own personal equation can overcome this difference in price. Against "price-cutting" on popular-branded goods, therefore, the "price-cutter's" competitors can present no ready argument. Until they throw out this brand, and take up another line, the "price-cutting" of their competitors on this brand threatens the dealers' actual existence. "Price-cutting" on popular-branded goods, therefore, affects their entire national distribution.

The capture by the "price-cutter" of his competitor's customers, under these circumstances, is seldom due to any enduring efficiency on the part of the "price-cutter." More often it is only a sudden raid, timed by the "price-cutter" so as to produce the greatest possible demoralization and stampede of his competitor's trade, not only in the lines on which he is cutting prices but also in all other lines, and executed at a large initial loss to the "price-cutter" in the confidence that under cover of the resulting demoralization and stampede he can more than recoup upon other lines.

So immediate and so deadly is this kind of "price-cutting" that if a "price-cutter" misses

killing his dealer-competitor—whom he generally aims to kill whenever he resorts to his kind of "price-cutting"—he not infrequently kills, and always seriously hurts, the manufacturer of the popular-branded goods—toward whom the "price-cutter," to give him credit, seldom has any real ill feeling whatsoever. For to the extent that the manufacturer has popularized his brand and developed a volume of trade, he begins to suffer the moment that dealers affected by the "price-cutting" of others become unable to handle the goods at a profit and cease to handle them at all. The manufacturer's own ability to distribute economically then stops. He cannot nationally distribute his goods direct to consumers—save, perhaps, in the case of a few high-priced articles—except at a vastly increased cost as compared with the normal basis. Since the goods are all identified by popular brands, the sensation which the "price-cutter" creates at the expense of his competitors fixes in the minds of consumers generally a depreciated price for the goods on the shelves of all other dealers who handle them, and prejudices every dealer in his struggle to obtain among his own trade the reputation for being an efficient and reliable dealer. Dealers everywhere, there-

fore, begin to avoid the goods like pestilence; distribution falls off, production has to be curtailed, the manufacturer's costs increase, and his ability to continue marketing the goods at the same price and quality is threatened, so that through the resulting loss in the reputation of the goods among dealers and consumers the manufacturer's business is always seriously hurt, and not infrequently is killed.

FITTING THE COURT'S OWN RULE

Doesn't this show that when the manufacturer of popular-branded goods has placed his goods on the dealer's shelves, he may have given that dealer something besides the mere physical goods? Isn't the damage which the manufacturer sustains from the dealer's "price-cutting" accomplished by the dealer's exploitation of the manufacturer's popular brand? May there not be wrapped up in that popular brand some of the manufacturer's *goodwill* and a very substantial *interest in his business?* Didn't the manufacturer perhaps *part* with this *interest in his business*, and entrust it to the dealer, the moment the manufacturer's popular-branded goods were placed upon the

dealer's shelves and the dealer thereby came possessed of this *goodwill* and *interest in the manufacturer's business* with the power of choice wholly with the dealer whether to use this *goodwill* and *interest in the manufacturer's business* for the purpose for which it was intended, or whether to use it to destroy the rest of the manufacturer's *goodwill* and *business?* Isn't it clear that when the manufacturer placed his popular-branded goods on the "price-cutter's" shelves he conferred a right by which, so far as concerns the manufacturer's distribution through all other dealers, the "*price-cutter" may compete with the manufacturer?* Certainly it would seem so; and if it is so, then isn't the analogy, which the Supreme Court—having before it, let us always remember, only the facts of the Dr. Miles case—seemed to think did not exist, really established in the cases we have just been discussing? And doesn't it follow, then, that so long as manufacturers of popular-branded goods in fact compete with other manufacturers, and so long as their dealers have the unrestricted right to pick and choose between rival lines and to accept or reject the terms upon which they are offered, contracts made by such manufacturers regarding resale prices of their popular-branded

goods, and voluntarily entered into by their dealers, ought *not* to be held to be unlawful?

With these questions, I step out of my assumed character of a very argumentative manufacturer of popular-branded goods, and return to the law regarding "price-cutting" as the Government and most courts are interpreting it today. Protracted as I have been, I nevertheless have spared you instances where "price-cutters" in order to recoup their losses have foisted unworthy substitutes on the public, and instances of the undoubted injury of the public where "price-cutting" has driven meritorious popular-branded articles from the market. Nor have I dwelt on the point, of which Mr. Justice Holmes made so much in his dissenting opinion in the Dr. Miles case, that the law, as now interpreted, favours those manufacturers whose large capital and extensive organization enable them to dispense entirely with the established wholesale and retail dealers, and who can establish branches, "chain-stores," employees, and agents in every centre, and thus sell their goods at their own prices with impunity directly to the ultimate consumers. Nor have I explained how the law, as now interpreted, prejudices the smaller manufacturers of popular-

branded goods, struggling against stiff competition and heavy odds, who have neither the capital nor the organization to dispense with the established wholesale and retail trade and to establish branches, "chain-stores," or representatives in every centre, but instead must utilize the usual and regular channels of wholesale and retail distribution, and in the process preserve as independent business units hundreds of thousands of dealers whose businesses have been built up through years of earnest effort. For already I hear Mr. Manufacturer, whose rôle I have so protractedly been declaiming, interrupting to say: All this may be good enough argument to urge some day upon the Supreme Court; and meanwhile it is, doubtless, good reason for the passage of some such legislation as the Stevens Bill, which proposes to let me make resale price agreements regarding branded goods manufactured and sold under competitive conditions provided that I give notice in the prescribed manner, and allow exceptions in certain prescribed circumstances, and am not myself violating the anti-trust laws in other directions. But what most concerns me is: What is the law today? After what the Supreme Court has said in the Wall-

paper case, the Copyright case, the Dr. Miles case, and the Sanatogen case, how in heaven's name, *can* I handle "price-cutting"?

HOW CAN "PRICE-CUTTING" BE HANDLED?

Well, if Mr. Manufacturer is venturesome by disposition, and his goods are patented, and he is willing to experiment in the twilight zone between the patent law and the anti-trust laws in the hope of working out some license restriction which may succeed like the license restriction in the Graphophone case and the Talking Machine case that I described in the chapter on the scope of patent protection, and which may not fail like the license restriction in the Ford case that I described in the same chapter or the license restriction in the Sanatogen case that I have already mentioned, he has something better than a gambler's chance.

If the manufacturer's product permits of distribution on the consignment basis, under an agreement by which title to the goods shall really remain in the manufacturer until the distributor shall actually dispose of them to the ultimate consumer, the manufacturer can, of course, handle the matter

easily. For in his consignment agreement he can make his distributor his legal agent, and, with the same positiveness and legal safety that the manufacturer fixes the price list at which his own salesmen sell, he can prescribe the price at which the distributor shall sell. It is only "price-cutting" upon the multitude of popular-branded goods which cannot be marketed on this basis that raises any practical problem.

"Cutting-off" the "price-cutter," by refusing to fill further orders from him, is very generally resorted to. Sometimes, the manufacturer tells the dealer more or less plainly that he will fill his orders only so long as he refrains from "price-cutting," or that he will cease filling any more of his orders unless he stops "price-cutting." Sometimes, the manufacturer simply refuses to fill the "price-cutter's" orders without stating any reason for his action. Sometimes, the manufacturer not only tells the "price-cutter" why he is refusing to fill his orders, but he also tells other dealers what he has done, and why, and asks them not to supply any goods to the "price-cutter." Sometimes, instead of refusing to fill the "price-cutter's" orders, the manufacturer simply quotes him a higher price than he charges other dealers.

Sometimes, as in the Cream of Wheat case described in the first and second chapters, no harm results to the manufacturer from this "cutting-off." Sometimes, as in the Grape Juice case described in the second chapter, considerable risk is run by doing only a few of these things. And sometimes, as in the Watch-case suit described in the second chapter, a Government prosecution and an injunction by the court are liable to result. None of these methods of "cutting-off" are, therefore, free from danger, and the United States Attorney is generally pretty alert to make trouble on account of any of them, when any of the surrounding circumstances convince him that they are part of a price-maintenance plan.

One manufacturer I know of, who markets a line of popular-branded goods that is peculiarly subject to "price-cutting," has accomplished surprisingly satisfactory results by personally writing each "price-cutter," as soon as he learns of his "price-cutting," and explaining the damage which the "price-cutter"—unwittingly, it is always suggested—is thereby causing to the manufacturer. This manufacturer has found that a brief, manly statement, courteously expressed in language that the dealer can understand, and setting

forth some of the chief considerations that I have already discussed, succeeds in inducing the "price-cutter" to desist when threats of "cutting-off" might be both futile and legally dangerous.

"I cannot believe," said Mr. Justice Holmes, dissenting from the opinion of the rest of the Supreme Court in the Dr. Miles case, "that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get." And it is interesting to learn, from the experience of this manufacturer, that even "price-cutters," when they really sit down and seriously reflect upon the economic laws governing the distribution of popular-branded goods, and upon the consequences of "price-cutting," sometimes come round to Mr. Justice Holmes's view, and voluntarily desist from this practice.

CHAPTER IX

WHY JOIN A TRADE ASSOCIATION?

ASSOCIATIONS are the order of the day. The Federal Trade Commission, in its cordial recognition of the good work of trade associations, has struck a responsive note in the heart of every progressive business man. The good work of trade associations in advancing the arts, in encouraging scientific management, in teaching better methods, in pointing the way to manufacturing and selling economics, in perfecting safety appliances for operatives, in reducing fire risks, in working out traffic problems, in maintaining credit bureaus, in co-operative trade advertising, and in a thousand and one other ways, deserves and has received the heartiest official commendation. Can there be any question, Mr. Business Man inquires, regarding the propriety of trade associations?

There can be, and is. Trade associations of

coal operators, coal dealers, railroads, pipe manufacturers, wholesale grocers, retail grocers, paper manufacturers, lumber dealers, retail druggists, powder manufacturers, plumbing supply manufacturers, butter and egg dealers, wire manufacturers, horse-shoe manufacturers, cable manufacturers, coaster-brake manufacturers, steamship lines, bill-posters, confectioners, tow-boat operators, publishers, produce dealers, and jewelry dealers have all been successfully prosecuted under the anti-trust laws! Criminal proceedings, have also been successfully prosecuted, and fines amounting to several hundred thousand dollars in the aggregate have been imposed against members of associations. Nor is this the end, for the Department of Justice now has pending civil suits and criminal actions against a number of such associations under the anti-trust law. Before this display of judicial and governmental disfavour, Mr. Business Man has excellent reason to be cautious.

ASSOCIATIONS WRECKED BY ANTI-TRUST LAWS

No time need be wasted over trade associations which fix prices or pool profits or divide territory in respect of the sale of unpatented articles.

Such associations are just about as dangerous as larceny, and are now pretty generally extinct; or if not extinct, they find safety only by being as retiring in their habits as a Black Hand gang or the Ku Klux Klan. Any association developing these atavistic traits deserves to be shunned like a house with the smallpox; for such an association, once discovered, is hardly a morning's job for the United States Attorney.

The fringe of the patent law, for some time, seemed to afford refuge for trade associations created out of patent license agreements. But the Bathtub decision, which has already been discussed in the chapter dealing with the scope of patent protection, disposed of one such association, in 1912, by a decree of dissolution under the anti-trust law, and paved the way for the successful prosecution under the anti-trust law of several similar associations in the wire, cable, and coaster-brake business. Within limits which are not yet entirely definite—as I have indicated already in that chapter—patent rights still afford a legitimate and lawful means by which, under certain circumstances, prices may be fixed and territory divided. But with the indictments and fines that marked the passing of these association failures,

the attractiveness and glory of patent license associations tended rather naturally to diminish.

The copyright law has also been tried, and found wanting. A number of years ago the publishers of about 75 per cent. of the copyrighted and uncopyrighted books of the United States organized in the American Publishers' Association, and a majority of the booksellers throughout the United States organized in the American Booksellers' Association. These associations adopted resolutions and made agreements obligating members to sell copyrighted books exclusively to those who maintained standard retail prices on such books. A department store that had indulged in persistent "price-cutting" was subsequently boycotted by members of the Publishers' Association. The methods of the Publishers' Association and the Booksellers' Association were described as follows by the Supreme Court:

"The Associations employed various methods of ascertaining whether prices of net copyrighted books were cut and whether there was competition in the sale thereof at retail, and issued cut-off lists, so-called, directing the discontinuance of the sale of copyrighted books to offenders, and that the plaintiffs in error, who had failed to

maintain net prices upon copyrighted books, had been put upon the cut-off lists and were unable to secure a supply of such books in the ordinary course of business. It further appears that in some instances dealers who had supplied the plaintiffs in error were wholly ruined and driven out of business; that the Booksellers' Association widely circulated the names of such dealers and warned others to avoid their fate, and that various circulars were issued to the trade at large by both Associations warning all persons against dealing with the plaintiffs in error or other so-called price-cutters; that after the reformation of the resolutions and agreements in 1904 the Associations and their members continued the same methods as to ascertaining the supply of copyrighted books of the plaintiffs in error, as to cut-off lists and circulars to the trade, and that, although in 1907 the resolution of the Publishers' Association was modified so that the 'agreement' became a 'recommendation,' the cut-off lists were still issued with plaintiff's name thereon and that the dealers still refused to supply plaintiff in error with books of any kind."

The department store sued the Publishers' Association for damages and to have the agreements

declared unlawful and enjoined. The New York Court of Appeals held that as regards uncopyrighted books the agreements were unlawful under the State anti-trust laws, but that as regards copyrighted books the agreements were entirely lawful. Upon this latter point, the department store took an appeal to the Supreme Court of the United States which held, in 1913, that the agreements were in violation of the Sherman Act even as regards copyrighted books. Subsequent proceedings by the department store against the publishers were eventually settled by the publishers paying something over $200,000 in lieu of damages.

Two trade associations in the retail lumber trade, which similarly came to grief, have already been discussed in earlier chapters. In one way or another, associations in the lumber trade have received a great deal of unwelcome attention from Uncle Sam; and proceedings under the anti-trust law are still pending against the officers and members of several of these lumber-dealer associations whose methods have fallen under official disapproval. Any association activity resembling boycotting or black-listing immediately arouses, as we have already seen, the prying curiosity of the United States Attorney. On several occasions,

the Attorneys-General of various States have been stirred into quite disagreeable activity. The United States Commissioner of Corporations, in 1914, published a report dealing with conditions of production and wholesale distribution in the lumber trade, and devoted a considerable part of this report to features of these associations which he very plainly regarded with considerable askance and suspicion. Trade associations, therefore, have by no means had a perfect record in the books of the Government.

When the Southern Wholesale Grocers' Association was investigated and proceedings filled against it for violating the anti-trust law, the association, in 1911, came into court, and consented to a decree which among other things enjoined the Association from "publishing, causing to be published, and assisting or encouraging the publication, distribution, or circulation of any book, pamphlet, or list, wherein is contained only the names of wholesale grocers, located in the territory embraced by said organization, who have announced their intention or agreed directly or indirectly, expressly or impliedly, to work in harmony with the association." This decree was pretty broad, but not broader, perhaps, than the court might

have entered after a full trial, if the surrounding circumstances showed any such state of facts as the Supreme Court has dealt with in the two lumber-dealer cases that I have already mentioned. This decree against the Wholesale Grocers' Association had been in effect a little more than a year when the Attorney-General of the United States received complaints that the decree was not being observed by the association. Thereupon the Attorney-General began another investigation of the association, and having convinced himself that the association had been disobeying the decree he filed new proceedings against the association, asking this time not for an injunction but for an attachment against certain officers and members for criminal contempt of court for violating the terms of the decree.

The court's interpretation of that passage of the decree that I have just quoted, and the court's discussion of some of the Wholesale Grocers' Association's activities, are well worth pondering.

ASSOCIATION'S RIGHT TO SELECT MEMBERS

"The association seems," said the court, "to have construed the words of the decree 'to work

in harmony with the association,' as being synonymous with 'members of the association.' That this was too narrow a construction is obvious. There was evidence *pro* and *con* upon the issue as to whether the list contained the names of persons or firms out of sympathy with the declared purposes of the association. It is clear that, if its names were purposely confined to those (whether members or non-members, or those otherwise not in sympathy with its purposes) who worked in harmony with the association in effecting its purpose of confining the sales of manufacturers to those who were exclusive wholesalers, then it answered the description of the lists that were enjoined by the decree; and the issuance, after the entry of the decree, of such lists would be a violation of it. Nor would the adding to or omission of names from the list, with the intent to evade the decree, change the situation in this respect. Whether the evidence is persuasive beyond reasonable doubt that the lists were of the description enjoined, so that the issue of them, disconnected from the circumstances under which they were issued, constituted of itself a contempt, need not be determined, in view of the difficulty, if not the impossibility, of

considering it apart from all the surrounding circumstances, and in view of the decision reached by the court that their issue, considered in connection with the attendant circumstances, constituted a violation of the decree."

Here we again meet our old acquaintances, "the surrounding circumstances," and see their malign influence in shaping the conclusions of the court as to whether the anti-trust laws have or have not been violated. That the court was always open-minded, however, appears from the way in which it disposed of the Government's contention that the association had violated the anti-trust laws and the decree when it required from prospective members, as a condition to election and to continuance in membership of the association, that they promise not to sell direct to consumers while they remain members of the association.

"It may be conceded," said the court, "as contended by the plaintiff, that a contract between many engaged in the same business to refrain from selling to an individual or a class would be an illegal restraint of trade under the Sherman Act, unenforceable at law and subjecting the participants to a criminal prosecution there-

under. Such a contract might be expressed or implied, or consist of a mere combination or conspiracy to accomplish that end. No definite form of agreement is required. The question, in this case, is whether such a contract, combination, or conspiracy can be deduced from the facts in evidence.

"The membership of the association was by its constitution (which met the approval of the Circuit Court) limited to exclusive wholesale grocers. To admit one to membership, it was first essential to determine his qualifications. It was therefore necessary for the association to ascertain concerning each applicant for membership whether he was, at the time he sought membership, an exclusive wholesaler. It would otherwise have been impossible to maintain an association composed only of the wholesale grocers, and the decree recognizes the propriety of an organization with such a membership. It would be equally impossible to maintain a like organization if members, after admission, were free to engage in retail business and still remain members. *It was therefore proper for the association to purge itself of retailers and semi-jobbers.* A means of doing this was to investigate the business of members

and drop those who might have lapsed into retailers. It would be futile to admit one to membership unless his expectation when admitted was to remain an exclusive wholesaler for a reasonable length of time, since otherwise he would cease to be eligible to continued membership as soon as he reverted to the retail business. *There could be no impropriety, for the purpose of determining present and future eligibility, to ask and receive assurances from the applicant that he expected to engage, while a member, in the exclusive wholesale business.* There was no other feasible way of determining eligibility to membership in the association. No oath to refrain from selling direct to consumers was administered to the applicant, and no forfeit, fine, or penalty imposed in case the promise was broken by him. No sanction accompanied the applicant's assurance or promise, and the only liability that followed a lapse on the part of the new member was ineligibility to continued membership. If an association exclusively of wholesale grocers was to exist, it was necessary that ineligibility be visited upon any member who ceased to be a wholesale grocer. This was as true in the absence of a promise or assurance as if one had existed. The purpose of the assurance

was merely to convince the association that there was a reasonable expectation on the part of the applicant to remain eligible long enough to justify admission to membership. His right to sell to consumers was not taken away or impaired for any definite time or at all. He had the option without restriction. He could not sell direct to consumers and remain a wholesaler. He must either give up the one or the other. This, however, was not by virtue of his promise or assurance, but only because the two things were incompatible with each other, as much so as are black and white" (italics added).

WHEN DOES PERSUASION BECOME COERCION?

Similarly, the court refused to agree with the Government's contention that the association had no right to try, by persuasion that fell short of coercion, to influence the conduct of manufacturers in respect of various kinds of trade practices.

"The Government also contends," said the court, "that the association, through its president, violated the decree in writing to manufacturers with the purpose, in one instance, to persuade the manufacturer to abandon the policy of giving

'free deals,' and in another to persuade the manufacturer to continue the policy of guaranteeing the prices of its goods, in the hands of the jobber, against declines. I do not find it necessary to determine the merits of these policies of their effect on prices. The letters written the manufacturers by the association seem to me to contain only legitimate arguments to support the contentions of the association. They contain on their face no hint of coercion or intimidation. It is conceded that in each case they failed to persuade the manufacturer to act as the association desired. While it is true that argument, addressed by a combination to an individual, should be closely scrutinized, in order to detect any veiled threat which may be cloaked under the language of argument, I do not think that such an inference can be fairly drawn from the correspondence relating to the discussion of the policies mentioned. Unless, therefore, it be true that a combination in the form of an association is disabled for that reason from addressing fair and legitimate argument to unorganized individuals, with the purpose of redressing what it considers to be grievances, the decree has not been violated by these acts. *The contention of the plaintiff is that the Sherman Act*

prohibits a combination from addressing even legitimate argument, which may affect interstate trade relations, to an individual engaged in trade of that character. If the principle is correct, it would work the extinction of all trade organizations except for purely social purposes. Their only other valuable function is to redress trade grievances by legal methods. If persuasion by argument, made in good faith and without coercion, expressed or implied, is not open to them for that purpose, their usefulness is at an end. It will not be denied that there are real advantages to be derived from a proper kind of co-operation, not obtainable by a single individual, unaided. It would be an unfortunate construction of the Sherman Law that would deprive individuals of the benefit and protection to be obtained from such co-operation. The decree permits the organization to continue to exist for other than social purposes; indeed, for all purposes other than those expressly enjoined. This impliedly recognizes that it may have other useful functions which it can legally perform. *No authority has been cited that goes to the extent contended for by the Government, and I am not prepared to create one*" (italics added).

When the court came, however, to the charge

that the association had coerced manufacturers to confine their sales to exclusive wholesalers, the court once more turned back to "the surrounding circumstances," and in its decision well illustrated the familiar truth that only careful living can really live down a bad past.

"The fourth class," said the court, "relates to alleged coercion of manufacturers exercised by the association to compel them to confine their sales to exclusive wholesalers. There is little evidence in the record of newly occurring acts of coercion of this kind, on the part of the association or its executive officers, after the date of the decree. The president is shown by the correspondence to have repeatedly disclaimed any effort on the part of the association to interfere with the policy of manufacturers in regard to distribution of their products. The disclaimers probably lose some of their force because of their iteration in stereotyped form. It is clear, however, that the record would not sustain a conviction upon these specifications, *if the association had had no previous history of coercion.* The only instances of attempts even to influence manufacturers since the date of the decree, appearing in the record, relate to the matters of abolishing the practice

of giving 'free deals' and retaining the practice of guaranteeing manufacturers' products in the hands of wholesalers against declines in prices. Other than these . . . the transactions between the association and the manufacturers were confined to the furnishing of information to manufacturers by the association on request as to the standing of applicants for the privilege of direct buying from the factory and the sending of the lists of the association to manufacturers. If these acts are to be construed merely as offers of assistance to the manufacturers in carrying out a policy of their own voluntary adoption, sympathized with but in no way induced by the association, they would probably not constitute violations of the decree. If there had been no previous history of such coercion connected with the distribution of the lists and the answering of the inquiries by the association, no other construction would be demanded. It is conceded that at one time the association did issue the lists, then designated 'Green Book,' as a means of compelling the manufacturers to confine their sales to those whose names appeared on the list; and there is shown no express repudiation of the former policy of coercion, aided by such means, before the date

of the decree. *The former history of coercion cannot be ignored in interpreting the meaning of the continued distribution of the lists and furnishing information to manufacturers, which occurred after the decree.* The association itself is charged with knowledge of all it had done in this respect, and it is difficult to conceive that its present executive officers had no actual knowledge of the previous coercion of manufacturers by the association through these means. The litigation in which the association had been involved, arising out of such acts of coercion, necessarily apprised them of it. Construing the acts of the association in issuing the lists after the date of the decree, in the light of the admittedly improper use to which the 'Green Book,' their predecessor, had been put before the decree, and without any express repudiation of such misuse by the association or its executive officers at any time, the inference seems a natural one that the association continued the issue of the lists and the furnishing of information in answer to inquiries with knowledge that they would have a like effect upon the manufacturers, who thereafter received them, as they had had before the decree. The issue of the lists and the responses to inquiries with this

effect constituted a violation of the act of July 2, 1890 . . . and of the final decree in the equity cause which expressly enjoined attempts to cause a manufacturer to refrain from selling retailers or whomsoever he pleased.

OFFICERS AND MEMBERS LIABLE

"These acts have an added significance to that of merely assisting a manufacturer in carrying out a policy of his own voluntary adoption and maintenance and partake of the coercion which had concededly accompanied similar acts of the association before the date of the decree. They constituted a deliberate utilization by the association, after the decree, of the influence over the manufacturers which the previous policy of coercion had gained for it, before and up to the time of the decree. It is not necessary, however, to decide whether such acts, in the absence of any misleading statements as to the effect of the decree, could constitute violations of its terms. There were such misleading statements made to the manufacturers. The association, on October 31, 1911, through its president, addressed to all manufacturers on its mailing list a circular, which

purported to be a response to inquiries from certain manufacturers as to whether the association would continue to issue the 'Green Book' after the decree, and which stated that it would continue to do so, and that none of the methods, rules of practice, or activities of the association would be affected by the decree. *In the light of the previous history of coercion, attending the distribution of the 'Green Book,' this could only have meant that the manufacturer who sold to unlisted persons would still incur the displeasure of the association.* A previous circular addressed to members, but also sent to manufacturers, cannot be said to have corrected the impression received from the circular of October 31, 1911. It was not addressed to manufacturers, it was not the last word of the association but was prior in point of time to that of October 31, 1911, and was not calculated by language to remove the impression naturally created by the circular of October 31, 1911, that the lists, which superseded the 'Green Book,' would continue to be issued by the association and with like effect as had been the 'Green Book.' That it was so understood by the manufacturers, members, and those desiring to become members or to be listed, so as to be entitled to direct buying privileges,

appears from the evidence tending to show that after the decree, as before, though probably to a less extent, there was a difficulty attending the direct buying from certain manufacturers who were supplied with the lists by the association, unless the name of the buyer appeared upon the lists, and a general impression that being listed was essential to direct buying privileges. This seems a fair deduction from the evidence, even after making allowance for the argument that the manufacturer and his salesmen would naturally be inclined to make the association a scapegoat for their own disinclination to sell the retailer. The record also shows that the president of the association acquired knowledge that this condition of the trade continued after the date of the decree and up to the time of the commencement of this proceeding. *It is true that he consistently stated it was not the function of the association to interfere with the manufacturer in his policy of distribution, yet it seems clear that these results of the issuance of the lists became known to him from the correspondence addressed to and received by him, and that he took no steps to correct the impression that had become so general in the trade.*

"For these reasons, I think the association and

its president violated the decree in sending the lists and information to the manufacturers, under these conditions, and when chargeable with this knowledge. The secretary was also technically guilty, but the evidence shows his acts were ministerial, and that he had no direction of the policy of the association" (italics added).

Individual members, as well as the association itself and some of its officers, fell under the condemnation of the court.

"There are," said the court, "two of the many defendants, outside of the association and its president, against whom the evidence of coercion is convincing. These are the defendants H. Lacy Hunt and L. A. Melchers. In each case the defendant attempted to prevent a manufacturer from selling a retailer direct, by a covert threat of the withdrawal of patronage of the writer and the other jobbers of the locality. In the case of Mr. Melchers there is a fair inference from his previous activities in connection with the association, from his furnishing to the manufacturer concerned the list of the association, as his guide in making sales, and from his mention of the local jobbers, that he was using the influence of the association to accomplish his purpose. In the case of Mr. Hunt

the use of the association's name and his position in it as a director, to fortify his influence as an individual, is express and unmistakable. He excuses his act by want of authority as a director to do what he stated in his letter to the manufacturer he would do. While this might exonerate the association, it cannot have that effect as to Mr. Hunt. He was a member, but not a director, when the decree was entered and testifies that he never saw or read it. The evidence of the government tends to show that copies of the decree were sent by registered mail to all members of the association. The defendant Hunt had knowledge of the fact that the association had been enjoined. Before attempting or assuming to act in his capacity as a director, as he did do, it was his duty to inform himself of the effect of the injunction, and, failing to do so, he acted at his peril. Both defendants testify that they had no intention of violating the decree in doing what they did. The decree would be valueless, if those bound by it, and who violate its terms, are permitted to purge themselves by denying the intention to do so or by pleading ignorance of the meaning of its terms. . . .

"My conclusion is that the defendant, the Southern Wholesale Grocers' Association, is guilty

of contempt in violating the decree of the court, and it is adjudged to pay a fine of $2500 and such part of the costs as were incurred because of the issues found against it; and that the defendants J. H. McLaurin, H. Lacy Hunt, and L. A. Melchers are guilty of contempt in violating the decree of the court, and each is adjudged to pay a fine of $1000 and such costs as each incurred because of the issues found gainst them, respectively. All the other defendants are discharged, with their costs" (italics added).

This Wholesale Grocers' case, which is almost a compendium of the law on this subject, and the two lumber-dealer cases decided by the Supreme Court already referred to, all teach us how dangerous it is for trade associations to attempt anything resembling black-listing and boycotting, and illustrate how prone are the courts to denounce many acts and practices that the general run of business men and association officials would hardly describe as black-listing or boycotting. We will do well, therefore, to go back, now, to the subject of prices, and see whether here there are any association activities, not expressly amounting to agreements regarding prices, which, nevertheless, may be in violation of the anti-trust laws.

"INTERCHANGE OF INFORMATION"

Take, for instance, "interchange of information": Surely members of a trade association, it is urged, can interchange information regarding orders in hand, terms and conditions on which orders are being filled, orders in prospect, and bids actually made and requests for bids! Orders and bids all imply prices. Why then, can't prices, and the folly of "price-cutting"—not the kind of "price-cutting" meant in the preceding chapter, but "price-cutting" between manufacturers and between brands—and the unwisdom of low prices, and the wisdom of increased prices, all be discussed in the course of this "interchange of information"? No prices are fixed; no agreement is arrived at; and if the members of the association, laying this unction to their souls, put on their hats after such "interchange of information," and go back to their offices, and each in his own way during the next few weeks marks up his prices without further communication with any other member, and to a different figure perhaps than any other member does, how can there be any danger, pray, from the anti-trust laws?

So long as its members enter into no agreement

to fix prices or control competition, some say, the legality of such an association can hardly be questioned. Probably this is so; but the question will always remain, How far removed from fixing prices and controlling competition *are* the results of such an association?

Now, the Supreme Court has repeatedly held the Sherman Act to "embrace every conceivable act which can possibly come within the spirit and purpose of the law, without regard to the garb in which such acts are clothed," with absolutely "no possibility of frustrating that policy by resorting to any disguise or subterfuge of form," nor yet "to escape by any indirection the prohibitions of the statute"; and courts and United States Attorneys have an uncomfortable way of sometimes drawing awkward conclusions regarding "intent" from "the surrounding circumstances." That business men, whatever they may *say*, really always *want* to raise prices as high as they can, seems to be the well-nigh universal assumption of courts and United States Attorneys. Everything, therefore, that members of a trade association *say* regarding prices and conditions affecting prices is, accordingly, viewed judicially and officially in the light of this well-nigh universal assump-

tion. See how the Gary Dinners were discussed by the District Court, in 1915, in the Steel Corporation case:

"We may begin the discussion," said the court in the Steel Corporation case, "by quoting the Government's concession in the original petition: 'It is not here alleged that merely assembling and mutually exchanging information and declaration of purpose amount to an agreement or a combination in restraint of trade.' With this concession we are in full accord. In these days every large business has its societies and associations and these meet periodically to exchange information of all kinds, to compare experiences, to take note of improvements in machinery or process, to discuss problems, and generally to profit by the interchange of ideas and the study of observed facts. When the business is manufacturing, of course, all this has a direct bearing on the subject of prices, and these conferences may therefore consider that subject specifically. It is probably unusual, however, to find such a meeting making a declaration of intention to charge such and such prices, although a mere declaration to that effect could hardly be regarded as unlawful. Freedom of speech and freedom of

individual action are justly prized in American society, and no legislation forbids men to come together and speak freely to each other about every detail of their common business. And if each individual should choose to announce at such a meeting the specific price he intends to charge for his wares, we are aware of no law that forbids him so to do. But at this point we approach debatable ground, for an individual is permitted to do some things that are denied to an association of individuals; and *where at a meeting of many persons such action is taken whose legality is afterwards called in question, the decision may be vitally affected by ascertaining the fact whether the action was really taken by each individual acting for himself, or whether those present were, in fact, pursuing a common object.*

DISTRICT COURT ON GARY DINNERS

"This country has always been committed to the principle of fair and real competition in business—the struggle between individuals to sell goods in a market free from artificial control or influence—and the Sherman Act merely repeats this principle when it condemns, in the first sec-

tion 'every contract or combination in restraint of trade.' When, therefore, individuals or corporations make distinct contracts with each other, either in the form of pools or other agreements, dividing territory, limiting output, or fixing prices, there can be no question about the illegality of such contracts. And it makes no difference whether or not the agreement attempts to fix a penalty for its breach. The essence of the offence is that agreement; the penalty is merely an incident; so that a so-called 'gentlemen's agreement' to divide territory, etc., is quite as illegal as a formal pool with a formal penalty. *In a gentlemen's agreement the sanction is the sense of honour, the moral obligation, the indefinite, but real force that in some instances compel persons to keep their promises simply because they have promised.*

"But suppose what happens is this: A number of persons take no action about territory or output, their discussions being mainly concerned with the subject of price, and suppose, further, that they refrain from making a definite formal agreement, and limit themselves to an understanding, a declaration of purpose—an announcement of intention—what, then, is to be said? Have they offended against the law? This ques-

tion cannot be answered until we know what the participants were really doing. *It is not enough to rest upon the varying names that may be given to the transaction. It is of the utmost importance to know how these names are to be interpreted, and this is the crucial matter to be looked for in the present record*" (italics added).

Accordingly, the court very carefully examined the Gary Dinners in all their bearings upon the Steel Corporation.

There were two concurring opinions written by the judges who decided the Steel Corporation case in the District Court. These two opinions concurred in their conclusions regarding the Gary Dinners and in their conclusions regarding the disposition of the entire case. Both opinions described the Gary Dinners at some length, and the quotation that follows contains the shorter description:

"The Gary Dinners," this opinion ran, "were dinners given by E. H. Gary, the president of the corporation, to which were invited representatives of steel-manufacturing concerns which theretofore had participated in the trade meetings, associations, and pools, and which produced '90 per cent. or more' of the total output of the diversi-

fied products of the steel industry of the country.

"The first Gary Dinner was given on November 20, 1907, to meet an unquestioned exigency arising out of the panic then existing. The steel industry, like many industries, was demoralized and threatened with disaster by the panic which began in the month preceding. The dinner was given in order to devise ways and means to prevent calamity to the industry. Ways and means were found which no doubt contributed greatly in preventing disaster, not alone to the producers of steel, but also to those intermediate consumers who were carrying large and costly supplies. The ways and means consisted then of nothing more than the urgent request of a strong man that in the stress of panic all should keep their heads and avoid the consequences of reckless cutting of prices. In this the others acquiesced, and *in the light of the emergency then existing, and the disaster averted, I am of opinion that the purpose and the conduct of those who participated in the first Gary Dinner were not unlawful, improper, or questionable.* But after the exigency had passed, and the means to meet it had been exerted, Gary Dinners were found to be potential things, and they were afterwards called and employed to

exert their potentiality, not in averting disaster, but in creating greater profits, by raising and maintaining prices in periods of industrial calm.

"Gary Dinners, while not regularly held, never adjourned. They were made continuous by the peculiar character of their organization. Being nothing more than business meetings, they were conducted in a business fashion. A general supervisory committee was appointed, and sub-committees were appointed to deal with the different products of the steel industry. These latter committees were known as the Steel Bar Committee, Ore and Pig Iron Committee, Rails and Billets Committee, etc. The membership of each committee was composed of representatives of the leading concerns which manufactured the particular product with which the committee had to do. These committees met between dinners and were accessible, through their chairmen, at all times between meetings. The only difference between the Gary Dinners and the meetings of the committees was that at the dinners the general business of the industry was discussed, while at committee meetings the business of a particular branch of the trade was discussed. At neither were agreements made concerning

prices at which the participants would sell their products. In fact, it was asserted and reasserted that such agreements were impossible, because illegal; but in lieu of agreements, the parties, both at the dinners and at the committee meetings, severally made what they chose to call *'declarations of purpose'—that is, declarations of the prices at which they respectively proposed to sell their products, to which prices it is testified all adhered until someone chose to deviate therefrom, in which event he was 'in decency' bound to notify his dinner associates or the members of the committee*" (italics added).

SPELLING OUT AN "UNDERSTANDING"

That the result of these meetings was an understanding about prices that was equivalent to an agreement was the conclusion reached by all the judges. Two of them wrote:

"Now to our minds the testimony taken as a whole makes the conclusion inevitable that *the result of these meetings was an understanding about prices that was equivalent to an agreement.* We have no doubt that among those present some silently dissented and went away intending to do what they pleased; but many, probably most,

of the participants, understood and assented to the view that they were under some kind of an obligation to adhere to the prices that had been announced or declared as the general sense of the meeting. Certainly there was no positive and expressed obligation; no formal words of contract were used; but most of those who took part in these meetings went away knowing that prices had been named and feeling bound to maintain them until they saw good reason to do otherwise, and feeling bound to maintain them even then until they had signified to their associates their intention to make a change. We cannot doubt that such an arrangement or understanding or moral obligation—whatever name may be the most appropriate—amounts to a combination or common action forbidden by law. *The final test, we think, is the object and the effect of the arrangement, and both the object and effect were to maintain prices, at least to a considerable degree*" (italics added).

The other judges were somewhat more emphatic. "Excepting the feature of trade allotments and money penalties," they said, "*Gary Dinners were in effect pools, with the right reserved to each participant to withdraw upon notice to the others.*

They differed from pools only in the difference between the binding forces of a moral understanding and the legal obligation of an express agreement. They were pools without penalties. They constituted a scheme which did not make it fatal for a competitor of the corporation to stay out, but made it attractive for him to stay in, the result of which was that prices were maintained with greater uniformity and stability than when the same participants engaged in pool agreements, violations of which carried penalties" (italics added).

Against the background of the Gary Dinners, the judges just quoted—who maintained a sterner attitude than the rest of the court—then proceeded to review the course of prices throughout the steel trade.

"This method of co-operative price regulation," they wrote, "was pursued uninterruptedly from November, 1907, to February, 1909. Throughout this time prices were fixed and maintained by 'understandings' enforced by 'moral obligations.' Through the period of depression of 1908, business so decreased in volume that early in 1909 independent producers broke their 'understandings' with the corporation and with one another, and

sold at prices which each fixed for itself, in complete disregard of previous 'understandings.' The corporation attempted to maintain for its products prices at the figures understood; that is, to maintain high prices in a period of business depression, and 'to force the issues against all economic conditions.' It attempted this alone, and in its attempt it failed. Therefore, in that year, the corporation was forced to declare for an 'open market'; that is, it sold at prices with respect to which there were no 'understandings,' and permitted 'natural laws' to take their course. The immediate results were *lower prices* and a *largely increased volume of trade*. If the abandonment by the corporation of its co-operative policy of fixing and maintaining prices 'brought out a large volume of business,' it logically follows that by the pursuit of that policy 'a large volume of business' had theretofore been held back—that is, restrained—and therefore that *the policy of co-operation as to prices, based upon mutual understandings and enforced by moral obligations, operated effectually and unduly to restrain trade*. . . .

"Coincident with the breaking of prices by the breaking of understandings made or reached

at Gary Dinners, Gary Dinners were temporarily discontinued. It has been contended all along that Gary Dinners had nothing to do with the fixation and maintenance of prices; that while stabilizing prices resulted from such dinners, nevertheless their primary purpose was to secure the establishment and maintenance of good relations between competitors, and to afford opportunities for the exchange of trade information and experience. *Is it not strange that a breach of an understanding as to the one matter of prices should have caused a discontinuance of the dinners, with the consequent loss of their primary benefits?*

"Gary Dinners were resumed in October, 1909, and *with their resumption higher prices were resumed.* By the proceedings at the Gary Dinners, and at the meetings of the dinner committees, the fixing and maintaining of prices were as successfully accomplished as by meetings called for that purpose during the period from 1904 to 1907, and by the pools created for that purpose from 1901 to 1904. . . . If by the three methods pursued, in the three periods named, prices were not artificially and successfully maintained, as shown by the history covering those three periods, I am at a

loss to know by what means it would be possible to fix and maintain prices that would unduly restrain trade in the sense of violating the anti-trust law" (italics added).

Few, if any, business men would indulge in such language in describing the operations of so mild and diluted a form of association activity as were the Gary Dinners. Few business men, indeed, would be likely to anticipate any such judicial warmth in the discussion of the subject. The Steel Corporation case has been appealed to the Supreme Court, so that these opinions, while the latest word upon the subject, are certainly not going to be the last, even as regards these identical Gary Dinners. I have, however, quoted these District Court opinions at this length, because the Gary Dinners were the only feature of the company that the District Court judges united in condemning; and because it was only for the reason that the Gary Dinners had ceased before the prosecution was started that the District Court appears to have refrained from enjoining them. These facts, and the careful scrutiny with which the judges reviewed every detail connected with the dinners, make their opinions tremendously significant.

EVEN COST-ACCOUNTING SCRUTINIZED

Take, now, a subject that, apparently, is very far removed from anything resembling an agreement upon prices,—the subject of cost-accounting.

Cost-accounting is absolutely essential in modern business. Standard systems of cost-accounting, adapted to the needs of particular industries, are obviously legitimate, whether proposed by trade associations or promulgated by individuals. Cost-accounting has been wisely and energetically encouraged by the Federal Trade Commission. One would hardly doubt, therefore, that in the standardization of cost-accounting trade associations had an opportunity for great service. But even in this direction, as we shall see, danger sometimes lurks.

The United States Commissioner of Corporations, in 1915, published the report of his investigation of farm machinery trade associations. In this report, he reviewed some tendencies that most business men would hardly suspect.

"The fear of prosecution under the anti-trust laws," said the Commissioner, "as well as practical difficulties in making direct price agreements, led to other methods of influencing prices. Co-opera-

tion in efforts to maintain prices made it apparent that this object could be more easily attained if each manufacturer made full allowance for every element of cost as a basis for determining profitable prices. For this purpose uniform cost-accounting systems were devised in order that prices based on costs so computed would be sure to afford a profit. Costs were made to include not only every item of actual expense and depreciation, but also provision for interest on investment. This plan was adopted by the wagon and the plow associations and later by the National Implement & Vehicle Association, in which they were merged.

"Exchange of information regarding the costs computed in this manner and the prices actually received, affords a means for determining prices profitable to all. If the individual members fix their prices accordingly, *substantial uniformity in prices may be established as effectively as by an express price agreement*" (italics added).

That the activity of trade associations in respect of cost-accounting may easily arouse the suspicion of the Government appears from the Commissioner's comments upon the National Implement & Vehicle Association.

"That the cost-accounting movement," said the Commissioner, "with its supplementary activities in respect to standard specifications, equipment, etc., has been adopted by the members of the National Implement & Vehicle Association as a means of establishing a higher price level and as a method by which to establish an approximate standard of prices for competing concerns admits of no doubt. The computation of cost includes interest, not only on borrowed money but also upon the investment, besides every possible item of expense, as well as allowances for all services rendered. This figure which is denominated 'cost' is obviously the equivalent of a profit-yielding price. The fundamental idea of cost in cost-accounting comprises outlay and waste and excludes any element of profit. The question whether a price computed in this manner is high or low is quite another matter, depending principally upon the rate at which the interest is computed.

"In the present instance this question has more than an academic interest. *If the laws of the United States forbid direct regulation of prices by competitors among themselves as agreements in restraint of trade, it should be determined whether*

they do not also forbid the regulation of prices by indirection, through concerted action of competitors in adopting a uniform system of cost-accounting, in exchanging information in regard to their costs, and through recommendations to fix prices in accordance with the cost. The adoption of common standards of cost and the exchange of information in regard thereto is mainly to secure a similar course of action on the part of each member.

"While prices of different makers of similar machines under this system tend to be approximately the same, yet the fact that the prices of each are based upon his own costs, even though comparisons are made, theoretically, at least, contemplates differences in prices to correspond to differences in costs. There should be a tendency toward the elimination of such differences, however, unless there were differences in quality corresponding to the differences in cost, in which case the prices would be substantially equalized by this method. The principle, however, of such a determination of prices through costs is not in harmony with the principle of competitive prices. It is evident, moreover, that the plan of meeting to discuss and compare costs computed on this basis involves the possibility of agreements

in respect to adoption of prices based upon the highest costs reported, or of agreements to add a high, uniform, arbitrary rate of profit, or even direct agreements on prices.

"The question to be emphasized here is whether competing manufacturers should be permitted to establish and maintain even approximately uniform prices by concerted action in comparing costs; and whether such proceedings are free from the dangers and objections incident to more direct methods of fixing uniform prices among competitors.

"Apart from this aspect of price regulation, it may be a proper function of trade associations to assist members to adopt a proper system of cost-accounting that shall accurately measure amounts actually expended for or chargeable to production. The adoption of standard specifications, recommended by associations, is often of advantage to both manufacturers and purchasers and tends to promote economies in industry and commerce. Frequently, however, the purpose in establishing standard or uniform equipment is to deprive the purchaser of some convenience that he has formerly received without any corresponding reduction in price. *The meeting of*

competitors to compare and discuss costs as a basis for prices is, however, as already stated, peculiarly susceptible of being used as a cloak for conferences to make agreements on prices" (italics added).

The gist of the whole matter appears to be this: Trade associations cannot safely meddle with prices, nor try to dictate the channels of trade. So alert are the Government and the courts to prosecute any such association activity that trade associations will do well to give the anti-trust laws the benefit of the doubt in respect of every association activity that even remotely encroaches upon these two forbidden subjects. "Interchange of information," while always dangerous business wherever these two subjects are touched upon, is not, however, an impossible feat for trade associations lawfully to accomplish, provided always that they observe proper safeguards and precautions. And trade associations, in their important and multifarious work of co-operatively improving technical processes, standardizing materials and products, increasing the safety and comfort of employees, recovering refunds for excessive freight charges, fostering new markets at home and abroad, simplifying

terms and instruments of credit, and limiting credit risks, have only best wishes and Godspeed from the Government, the Federal Trade Commission, and the courts.

CHAPTER X

BIBLIOGRAPHY AND AUTHORITIES

THE court decisions and other proceedings cited, quoted, or otherwise particularly referred to in the preceding chapters may be identified in the following list by their "catch names":

"Adding Machine Case": *United States v. The Burroughs Adding Machine Company et al.* Petition was filed March 3, 1913, in the Federal District Court at Detroit, Michigan, alleging that the defendants were engaged in a conspiracy to monopolize interstate trade and commerce in adding machines. A consent decree was entered at Detroit on March 3, 1913.

"Bath-tub Case": *United States v. Standard Sanitary Manufacturing Company et al.* Petition was filed July 22, 1910, in the Federal Circuit Court, District of Maryland, charging a combination, under cover of a patent licensing arrangement, to restrain competition and enhance prices of enamel ware. In a decision rendered October 13, 1911 (191 Fed. 172), the court sustained all the Government's contentions, and a decree was entered November 25, 1911, from which an appeal was taken to the Supreme Court.

The decision of the lower court was affirmed by the Supreme Court November 18, 1913 (226 U. S. 20).

"Button Setting Case": *Elliott Machine Company v. Center.* This was a suit in equity in the Federal District Court, Western District of Michigan, Southern Division, to restrain the use of the plaintiff's leased machines by the defendant in infringement of the plaintiff's patents. Motion to dismiss the bill in equity was denied February 20, 1915 (227 Fed. 124).

"Can Case": *United States v. American Can Company et al.* Petition was filed November 29, 1913, in the Federal District Court at Baltimore, Maryland, alleging monopolization of the business of making tin cans. In a decision rendered February 23, 1916, the court held that the company had been organized in violation of the Sherman Act, but the court declined to dissolve the company and decided merely to retain jurisdiction of the suit (230 Fed. 859), and entered a decree to that effect July 7, 1916. An appeal has been taken to the Supreme Court.

"Cash Register Case": *United States v. National Cash Register Co. et al.* Petition was filed December 4, 1911, in the Federal Circuit Court, Southern District of Ohio, alleging conspiracy and monopoly in the manufacture, sale, and shipment of cash registers and other registering devices. A consent decree was entered February 1, 1916.

"Cash Register Case": *United States v. John H. Patterson et al.* Indictment was returned February 22, 1912, in the Federal District Court for the Southern District of Ohio, against certain officials and employés of the National Cash Register Company,

alleging a conspiracy in restraint of interstate trade and commerce in cash registers. Demurrer was overruled June 26, 1912 (201 Fed. 697). The trial (see 205 Fed. 292) resulted in a verdict of guilty as to all but one of the defendants. Upon appeal to the Circuit Court of Appeals, however, this verdict was unanimously reversed March 13, 1915 (222 Fed. 599). The Government's application to the Supreme Court for a writ of certiorari was denied June 14, 1915 (238 U. S. 635), and on February 1, 1916, the prosecution was discontinued by an order of *nolle prosequi*.

"Coal Tar Case": *United States v. American Coal Products Company et al.* Petition was filed March 3, 1913, in the Federal District Court at New York City, charging the defendants with monopolizing the supply of coal tar and restraining the trade of competitors in the purchase of coal tar and in the manufacture and sale of tarred roofing felts, coal-tar pitch, and other coal-tar products. A consent decree was entered on March 4, 1913.

"Coca-Cola Case": *Coca-Cola Company v. Bennett.* This was a suit in equity in the Federal District Court for Kansas, Second Division, to restrain the infringement of the plaintiff's trademark by the defendant. The petition was dismissed for want of equity March 5, 1915 (225 Fed. 429).

"Copyright Case": *Bobbs-Merrill Company v. Strauss.* This was a suit in equity in the Federal Circuit Court at New York City to restrain the sale of a novel copyrighted by the plaintiff. The Circuit Court dismissed the bill July 11, 1905 (139 Fed. 155), and this decision was affirmed by the Circuit Court of

Appeals June 16, 1906 (147 Fed. 15), and by the Supreme Court June 1, 1908 (210 U. S. 339).

"Corn Products" or "Glucose Cases:" see "Glucose" or "Corn Products Cases" below.

"Creamery Package Case": *Virtue v. Creamery Package Manufacturing Company.* This was an action in the Federal Circuit Court for the District of Minnesota to recover treble damages under the Sherman Act. Upon appeal from a judgment for the defendants, this judgment was affirmed by the Circuit Court of Appeals March 23, 1910 (179 Fed. 115), and by the Supreme Court January 20, 1913 (227 U. S. 8).

"Cream of Wheat Case": *Great Atlantic and Pacific Tea Company v. Cream of Wheat Company.* This was a suit in equity in the Federal District Court in New York City to enjoin the defendant from refusing to sell Cream of Wheat to the plaintiff. The plaintiff's motion for a preliminary injunction was denied July 20, 1915 (224 Fed. 566), and upon appeal this decision was affirmed by the Circuit Court of Appeals November 10, 1915 (227 Fed. 46).

"Danbury Hatters' Case": *Loewe v. Lawlor et al.* This was an action in the Federal Circuit Court for Connecticut to recover treble damages under the Sherman Act. A plea in abatement was overruled June 9, 1904 (130 Fed. 633). A motion to correct the complaint was denied December 13, 1905 (142 Fed. 216). The complaint was then dismissed on demurrer December 7, 1906 (148 Fed. 924). From this judgment the plaintiffs appealed, and the Supreme Court reversed it February 3, 1908, and held that the complaint set up a case under the statute and that the

demurrer should have been overruled (208 U. S. 274). The case was then tried, and the plaintiffs recovered judgment for $232,240.12. Upon appeal, the Circuit Court of Appeals reversed this judgment and ordered a new trial April 10, 1911 (187 Fed. 522). The case was then retried, and the plaintiffs recovered judgment for $252,130 November 15, 1912. Upon appeal, this judgment was affirmed by the Circuit Court of Appeals December 18, 1913 (209 Fed. 721), and by the Supreme Court January 5, 1915 (235 U. S. 522).

"Dr. Miles Case": *Dr. Miles Medical Company v. John D. Park & Sons Company.* This was a suit in equity to enforce a system of agreements in respect of resale prices. Upon demurrer, the bill in equity was held not to state a cause of action, and upon appeal this decision was affirmed by the Circuit Court of Appeals September 10, 1908 (164 Fed. 803), and by the Supreme Court April 3, 1911 (220 U. S. 373).

"Ford Case": *Ford Motor Company v. Union Motor Sales Company.* This was a suit in equity in the Federal District Court for the Southern District of Ohio, Western Division, to enjoin the defendant from infringing the plaintiff's patents and license restrictions and price restrictions. The bill in equity was dismissed December 4, 1914 (225 Fed. 373).

"Glucose" or "Corn Products Case": *Wilder Manufacturing Company v. Corn Products Refining Company.* This was an action in the City Court of Atlanta, Georgia, by the Corn Products Refining Company against the Wilder Manufacturing Company for goods sold and delivered. From a judgment rendered September 22, 1911, in favor of the Corn

Products Refining Company, the Wilder Manufacturing Company appealed to the Georgia Court of Appeals, which affirmed judgment October 2, 1912 (11 Ga. App. 588), and then to the Supreme Court of the United States, which affirmed judgment February 23, 1915 (236 U. S. 165).

"Glucose" or "Corn Products Case": *United States v. Corn Products Refining Company et al.* Petition was filed March 1, 1913, in the Federal District Court at New York City, charging defendants with monopolizing interstate trade and commerce in corn products, and praying for the dissolution of the combination. The case was argued March, 1916, and a decision favorable to the Government, and ordering the dissolution of the combination, was handed down June 24, 1916, and a decree to that effect was entered November 13, 1916.

"Grape Juice Case": *Frey & Son Inc. v. Welch Grape Juice Company.* This was an action in the Federal District Court for Maryland to recover treble damages under the Sherman Act and the Clayton Act. Upon the trial, the jury returned a verdict for the defendant in May, 1916.

"Graphophone Case": *American Graphophone Company v. Boston Store of Chicago.* This was a suit in equity in the Federal District Court for the Northern District of Illinois, Western Division, to enjoin the violation of price restrictions upon the resale of the plaintiff's patented product. Motion to dismiss the bill of complaint was denied, and an injunction was granted September 3, 1915 (225 Fed. 785).

"Harrow Case": *Adriance Platt & Company v.*

National Harrow Company. This was a suit in equity to enjoin the publication by the defendant of circulars denouncing the plaintiff's harrow as an infringement of the defendant's patents. The bill of complaint was dismissed November 25, 1901 (111 Fed. 637). Upon appeal, the Circuit Court of Appeals reversed this decision February 25, 1903 (121 Fed. 827).

"Harvester Case": *United States v. International Harvester Company et al.* Petition was filed April 30, 1912, in the Federal District Court, District of Minnesota, alleging the acquisition and maintenance of a monopoly in harvesting and agricultural machinery and implements and twine. Testimony was taken, an expediting certificate was filed, and the case was argued before three circuit judges at St. Paul during November, 1913. The court sustained the contentions of the Government August 12, 1914 (214 Fed. 987), and a decree dissolving the combination was entered August 15, 1914. The defendants appealed to the Supreme Court, and the case was argued there in April 1915. On June 2, 1915, the court ordered the case restored to the docket for reargument, which has been set for February, 1917.

"Harvester Investigation": *International Harvester Company.* Bureau of Corporations, Government Printing Office, March 3, 1913.

"Ice Case": *Wood v. Texas Ice & Cold Storage Company.* This was an action upon a contract in the District Court of Texas, Dallas County. From a judgment for the defendant the plaintiff appealed to the Court of Civil Appeals of Texas, which affirmed judgment November 28, 1914 (171 S. W. 497).

"Kodak Case": *United States v. Eastman Kodak Company et al.* Petition was filed June 9, 1913, in the Federal District Court at Buffalo, Western District of New York, alleging that the defendants had acquired a monopoly of the business of manufacturing, selling, and distributing photographic supplies. A decision favorable to the Government was handed down August 24, 1915 (226 Fed. 62), and a final decree in conformity therewith was entered January 20, 1916 (230 Fed. 522). The defendants have appealed to the Supreme Court.

"Lamp Case": *United States v. General Electric Company et al.* Petition was filed March 3, 1911, in the Federal District Court for the Northern District of Ohio, charging a combination in the manufacture of incandescent electric lamps. A decree was agreed upon between counsel, which was entered by the court October 12, 1911.

"Lumber Dealers' Case": *Grenada Lumber Company v. Mississippi.* This was a suit in equity in the Chancery Court of Holmes County, Mississippi, by the State of Mississippi against the Grenada Lumber Company. From a decree overruling a demurrer to the bill in equity, the Company appealed to the Supreme Court of Mississippi, which affirmed the decree October, 1910 (98 Mississippi 536). The Company then appealed to the Supreme Court of the United States, which affirmed the decree May 2, 1910 (217 U. S. 433).

"Lumber Dealers' Case": *United States v. Eastern States Retail Lumber Dealers Association.* Petition was filed May 19, 1911, in the Federal Circuit Court

for the Southern District of New York, charging the defendants with conspiring to restrain trade through the instrumentality of black lists and trade agreements. Decision by the lower court in favor of the Government was rendered January 9, 1912 (201 Fed. 581), and a decree was entered March 1, 1913, from which an appeal was taken to the Supreme Court. The Supreme Court affirmed the decree June 22, 1914 (234 U. S. 600).

"Lumber Dealers' Investigation": *Lumber Industry.* Bureau of Corporations, Government Printing Office: Part I published January 20, 1913, Parts II and III published July 13, 1914, and Part IV published April 21, 1914.

"Mimeograph Case": *Henry v. A. B. Dick Company.* This was a suit in equity in the Federal Circuit Court in New York City by the A. B. Dick Company to enjoin the contributory infringement of its patents. The A. B. Dick Company obtained an injunction January 11, 1907 (149 Fed. 424) and, upon appeal by Henry, the Circuit Court of Appeals certified questions to the Supreme Court, which answered them in the affirmative and in effect affirmed the decree March 11, 1912 (224 U. S. 1).

"Mimeograph Case": *Federal Trade Commission v. A. B. Dick Company.* Complaint was issued April 17, 1916, by the Federal Trade Commission on the ground that the A. B. Dick Company was selling machines under a license restriction in violation of Section 3 of the Clayton Act. Hearings have been held, and testimony taken, and the proceeding is pending.

"Motion Picture Case": *United States v. Motion*

Picture Patents Company et al. Petition was filed August 15, 1912, in the Federal District Court for the Eastern District of Pennsylvania, to remove the restraints which defendants are alleged to have imposed upon interstate and foreign trade and commerce in machines, appliances, and apparatus relating to the motion-picture art, and upon persons engaged in such trade and commerce. A decision favorable to the Government was handed down October 1, 1915 (225 U. S. 800), and a decree in conformity therewith was entered January 24, 1916. The defendants have appealed to the Supreme Court.

"News Plate Case": *United States v. Central-West Publishing Co. et al.* Petition was filed August 3, 1912, in the Federal District Court for the Northern District of Illinois, charging the defendants with engaging in unfair competition against each other and against others in competing industries, with the intent to restrain and monopolize interstate trade and commerce in plate and ready-print matter. A consent decree, granting relief as prayed for, was entered at Chicago on August 3, 1912. Contempt proceedings for alleged violations of this decree were instituted June 7, 1915.

"North Atlantic Steamship Pool": *United States v. Hamburg-Amerikanische Packet-fahrt Actien Gesellschaft and others.* Petition was filed January 4, 1911, in the Federal Circuit Court for the Southern District of New York, to dissolve a combination of steamship lines regulating steerage traffic on the Atlantic Ocean. Demurrers to the petition were overruled December 20, 1911 (200 Fed. 806). A decision adverse to the

Government was handed down by the lower court October 13, 1914 (216 Fed. 971). The Government appealed to the Supreme Court, which on January 10, 1916, refused to decide the questions in issue, on the ground that the European War had rendered them moot (239 U. S. 466).

"Packers' Case": *United States v. Swift & Co. et al.* Petition was filed May 10, 1902, in the Federal Circuit Court for the Northern District of Illinois, charging the defendants, who were engaged in the buying of live stock and the selling of dressed meats, with carrying out an alleged unlawful conspiracy entered into between themselves and the various railway companies to suppress competition and to obtain a monopoly. Demurrers to the petition were overruled on April 18, 1903, and a preliminary injunction was granted (122 Fed. 529). The defendants having failed to answer, the court, on May 26, 1903, entered a final decree. The defendants appealed from this decree to the Supreme Court of the United States, where it was affirmed January 30, 1905 (196 U. S. 375).

"Pattern Case": *Butterick Publishing Company v. Fisher.* This was a suit in equity in the Massachusetts Superior Court, Essex County, to enjoin the sale of rival patterns by a dealer in violation of his contract with the plaintiff. The defendant demurred on the ground that the contract was unlawful, but the demurrer was overruled, and the case went to trial. The court refused to grant an injunction, and entered a decree for the defendant. Upon appeal to the Massachusetts Supreme Court, however, the

decree was reversed and an injunction was ordered September 8, 1909 (203 Mass. 122).

"Pattern Case": *Butterick Publishing Company v. Rose.* This was a suit in equity in the Wisconsin Circuit Court, Wood County, to enjoin the sale of rival patterns by a dealer in violation of his contract with the plaintiff. The defendant demurred on the ground that the contract was unlawful, but the demurrer was overruled. Upon appeal to the Wisconsin Supreme Court, the decision was affirmed February 1, 1910 (141 Wisc. 533).

"Pattern Case": *Pictorial Review Company v. Pate Brothers.* This was an action in the Texas Justice Court, Erath County, to recover upon a contract. From a judgment dismissing the action on the ground that the contract was unlawful, the plaintiff appealed to the County Court for Erath County; and from affirmance by the County Court the plaintiff appealed to the Texas Court of Civil Appeals which, in turn, affirmed the decision February 5, 1916 (185 S. W. 309).

"Powder Case": *Buckeye Powder Company v. E. I. du Pont de Nemours Powder Company et al.* This was an action in the Federal District Court for the District of New Jersey to recover treble damages under the Sherman Act amounting to $3,859,973.46. Motion to strike out the declaration was denied March 28, 1912 (196 Fed. 514). Upon the trial, the jury found a verdict for the defendants (February 25, 1914). Upon appeal to the Circuit Court of Appeals, this judgment was affirmed July 2, 1915 (223 Fed. 881).

"Projecting Machine Case": *Motion Picture Patents Company v. Universal Film Company et al.* This was a suit in equity in the Federal District Court at New York City to enjoin the defendants from infringing the plaintiff's patents and license restrictions. The District Court dismissed the bill in equity in December, 1915, and upon appeal to the Circuit Court of Appeals, this decision was affirmed June 15, 1916 (235 Fed. 398).

"Publishers' Case": *Strauss v. American Book Publishers et al.* This was a suit in equity in the New York Supreme Court for damages and to enjoin the defendants from enforcing a system of agreements relating to the resale price of copyrighted and uncopyrighted books. Demurrer to the complaint was sustained January 27, 1903, but on appeal to the Appellate Division this decision was reversed so far as it related to copyrighted books July, 1903 (85 A.D. 446), and on appeal to the New York Court of Appeals, this decision of the Appellate Division was affirmed February 23, 1904 (177 N. Y. 473). Meanwhile, the plaintiff's motion for a temporary injunction had been denied by the New York Supreme Court January 9, 1903. But after the Court of Appeals decision above mentioned, this order denying the injunction was reversed, and an injunction was granted by the Appellate Division in March, 1904 (92 A.D. 350), and the defendants filed answers, portions of which were struck out by the Appellate Division in July, 1904 (96 A.D. 315) and other portions of which were held by the New York Supreme Court to be insufficient upon demurrer in November, 1904 (45 Misc. 251),

and still other portions of which were held by the Appellate Division to be sufficient upon demurrer in April, 1905 (103 A. D. 277). Thereafter, the Supreme Court of the United States in *Bobbs-Merrill v. Strauss* held June 1, 1908 (210 U. S. 339, see "Copyright Case" above), that so far as resale price arrangements were concerned the copyright law had no effect. Nevertheless, when the New York case came to trial, interlocutory judgment was entered by the New York Supreme Court November 20, 1907, refusing an injunction so far as copyrighted books are concerned, but granting it in respect of uncopyrighted books; and on appeal this judgment was affirmed by the Appellate Division in July, 1908 (127 A. D. 935) and by the New York Court of Appeals December 8, 1908 (193 N. Y. 496). The case then went to trial and final judgment, and upon appeal from the final judgment the same decision was reached by the Court of Appeals September 27, 1910 (199 N. Y. 548). Upon appeal to the Supreme Court of the United States, however, the Court of Appeals decision in respect of copyrighted books was reversed December 1, 1913 (231 U. S. 222). Pending this action, the same plaintiffs began action in the Federal Circuit Court at New York City for treble damages under the Sherman Act against the same defendants. After some preliminary motions (see 178 Fed. 586), judgment for the defendants was granted upon a motion on the pleadings December 9, 1912 (201 Fed. 306). Subsequently, this litigation was settled upon payment of upwards of $200,000 by the defendants.

"Reading Case": *United States v. The Reading*

Company et al. Petition was filed June 12, 1907, in the Federal Circuit Court, E. D. of Pennsylvania, charging a combination among the anthracite coal carrying roads and others. On December 8, 1910, a decision was handed down by the Circuit Court adjudging that defendants were joined in a combination in restraint of trade through the instrumentality of the Temple Iron Company, but dismissing the charge of the petition as to the so-called 65 per cent. contracts and as to certain alleged minor combinations (183 Fed. 427). Cross appeals were taken to the Supreme Court, where on December 16, 1912, the decree of the lower court, in so far as it adjudged the defendants parties to a combination in restraint of trade through the instrumentality of the Temple Iron Company, was affirmed, but was reversed as to the so-called 65 per cent. contracts with instructions to cancel them, and was modified by dismissing the petition in other respects without prejudice, instead of absolutely (226 U. S. 324). On April 7, 1913, this decree was further modified by the Supreme Court as to certain of the companies having so-called 65 per cent. contracts (228 U. S. 158).

"Register Machine Case": *United States v. The McCaskey Register Company et al.* Petition was filed February 20, 1913, in the Federal District Court at Cleveland, Northern District of Ohio, charging the defendants with conspiring to restrain and monopolize the manufacture and sale of account registers and appliances. Upon reinvestigation, the case was dismissed without prejudice January 7, 1915.

"Sanatogen Case": *Bauer v. O'Donnell.* This

case came from the Court of Appeals of the District of Columbia on a certificate to the Supreme Court of the United States, which held on May 26, 1913, that O'Donnell, having bought Sanatogen from jobbers, could retail it at less than the price prescribed in the appended notice of the manufacturer without infringing the manufacturer's patents (229 U. S. 1).

"Shoe Machinery Case": *United States v. S. W. Winslow et al.* Two indictments were returned September 19, 1911, in the Federal District Court of Massachusetts charging combination, conspiracy, and monopoly in trade in shoe machinery. A demurrer to one indictment was sustained, and a demurrer to the other indictment was overruled as to the first count and sustained as to the second count March 2, 1912 (195 Fed. 578). An appeal was taken by the United States from the latter decision, which was unanimously affirmed by the Supreme Court February 3, 1913 (227 U. S. 202).

"Shoe Machinery Case": *United States v. United Shoe Machinery Co., et al.* Petition in equity was filed December 12, 1911, in the Federal Circuit Court, District of Massachusetts, alleging combinations and conspiracies in restraint of interstate and foreign trade in shoe machinery, and praying for a restraining order and the dissolution of the company. Upon the trial, the court decided unanimously in favor of the defendants March 18, 1915 (222 Fed. 349). From this decision the Government has appealed to the Supreme Court, which has set the argument for February, 1917.

"Shoe Machinery Case": *United States v. United*

Shoe Machinery Company et al. Petition was filed October 18, 1915, in the Federal District Court at St. Louis, Missouri, charging that the leases used by the defendants are in violation of Section 3 of the Clayton Act. The Government obtained a preliminary injunction November 9, 1915(227 Fed. 507)which, upon appeal, was vacated on waiver by the Government, May, 1916. A motion to dismiss the petition was denied June 7, 1916 (234 Fed. 127), and the case is now awaiting trial.

"Steel Case": *United States v. United States Steel Corporation and others.* Petition was filed October 27, 1911, in the Federal District Court for the District of New Jersey, alleging a combination in restraint of interstate commerce in iron and steel and their products and an attempt to monopolize. Upon the trial, the court decided against the Government June 3, 1915 (223 Fed. 55), and a decree dismissing the petition was entered September 10, 1915. From this decision, the Government has appealed to the Supreme Court, which has set the argument for February, 1917.

"Stone-Cutting Case": *United States v. The Cleveland Stone Company et al.* Petition was filed February 12, 1913, in the Federal District Court at Cleveland, Northern District of Ohio, charging the defendants with establishing and maintaining a practical monopoly of the stone business. A final decree granting the relief sought by the Government was entered, without contest, February 11, 1916.

"Talking Machine Case": *Victor Talking Machine Company v. Strauss, et al.* This was a suit in equity in the Federal District Court at New York City to

enjoin the defendants from infringing the plaintiff's patents and license restrictions. Upon the defendant's motion, the bill in equity was dismissed March 23, 1915 (222 Fed. 524), and on appeal to the Circuit Court of Appeals this decision was affirmed with leave to the plaintiffs to amend their bill in equity July 17, 1915 (225 Fed. 535). The plaintiffs then filed an amended bill in equity, which was dismissed by the District Court. Upon appeal, this decision was reversed by the Circuit Court of Appeals, January 11, 1916 (230 Fed. 449). Petition for certiorari was granted by the Supreme Court, March 6, 1916 (241 U. S. 662).

"Thread Case": *United States v. The American Thread Company et al.* Petition was filed March 3, 1913, in the District Court at Trenton, New Jersey, charging the defendants with monopolizing the thread industry. The answers of the defendants were filed September 10, 1913, but the defendants did not contest the case, and a decree was entered dissolving the combination and enjoining certain trade practices June 2, 1914.

"Tobacco Case": *Whitwell v. Continental Tobacco.* This was an action in the Federal Circuit Court for the District of Minnesota for treble damages under the Sherman Act. The Circuit Court held that the complaint failed to state facts sufficient to constitute a cause of action. Upon appeal, the Circuit Court of Appeals affirmed this decision November 12, 1903 (125 Fed. 454).

"Tobacco Case": *Commonwealth v. Strauss.* The defendant was indicted June 6, 1904, in the Massa-

chusetts Supreme Court for Plymouth County, and was convicted. Upon appeal to the Massachusetts Supreme Court, the conviction was set aside and a new trial ordered May 19, 1905 (188 Mass. 229). Upon the new trial, the defendant was again convicted. Upon appeal to the Massachusetts Supreme Court, this conviction was sustained May 16, 1906 (190 Mass. 545).

"Tobacco Case": *United States v. American Tobacco Company et al.* Petition was filed July 10, 1907, in the Federal Circuit Court for the Southern District of New York, in which it was alleged that defendants were maintaining a combination in restraint of trade and commerce in the manufacture and sale of tobacco. On November 7, 1908, a decision was rendered in favour of the Government, except as to individual defendants and certain foreign and other corporations (164 Fed. 700). Cross appeals were taken to the Supreme Court, where, on May 29, 1911, a decision was rendered, sustaining the Government (221 U. S. 106). The case was remanded to the Circuit Court, and the combination was dissolved in accordance with the decision of the Supreme Court November 15, 1911 (191 Fed. 371).

"Tobacco Investigation": *Tobacco Industry.* Bureau of Corporations, Government Printing Office: Part I, published February 25, 1909, Part II published September 25, 1911, Parts III and IV published March 15, 1915.

"Trade Association Cases": Some of the more recent prosecutions by the Federal Government are the following: *U. S. v. Carl C. King et al.* (Aroostook

Potato Shippers' Association). Indictment was returned March 4, 1915, in the Federal District Court for the District of Massachusetts, charging the defendants with entering into a conspiracy in restraint of trade in potatoes. Upon the trial five defendants were convicted October 10, 1916. *U. S. v. Irving et al.* Indictment was returned October 31, 1914, in the Federal District Court for the District of Utah, against fourteen master plumbers and retail dealers in plumbing supplies, charging them with entering into a combination to secure a monopoly of the business of selling and installing plumbing supplies. A demurrer to the indictment was overruled and a motion to quash was denied January 25, 1915, and the case was tried in September, 1916. Twelve defendants were convicted, and fines aggregating $7250 were imposed by the court, and paid. *U. S. v. McCoach et al.* Indictment was returned October 5, 1914, in the Federal District Court for the Western District of Pennsylvania against thirty-three master plumbers and retail dealers in plumbing supplies charging them with entering into a combination to secure a monopoly of the business of selling and installing plumbing supplies. This case is still pending. *U. S. v. Collins, et al.* Indictment was returned September 4, 1914, in the Supreme Court of the District of Columbia against thirty-one commission merchants, charging them with engaging in a combination to fix, arbitrarily and without competition, the prices at which country produce is sold in the District of Columbia. Defendants entered pleas of *nolo contendere* in December, 1915, and fines aggregating $650 were imposed. *U. S.*

v. Western Cantaloupe Exchange et al. Indictment was returned August 7, 1914, in the Federal District Court for the Northern District of Illinois charging the defendants with having entered into a combination to restrain and monopolize interstate trade in cantaloupes. This case is now awaiting trial. *U. S. v. Knauer et al.* Indictment was returned June 4, 1914, in the Federal District Court at Des Moines, Iowa, charging the defendants, who were members of the National Association of Master Plumbers, with having entered into a combination in restraint of trade in plumbing supplies. A demurrer to the indictment and a motion to quash were overruled November 25, 1914. Upon the trial, a verdict of guilty was returned February 24, 1915, and four defendants were fined amounts aggregating $3,000. From this decision appeal was taken to the Circuit Court of Appeals which affirmed judgment September 16, 1916. *U. S. v. National Wholesale Jewelers' Association et al.* Petition was filed November 18, 1913, in the Federal District Court at New York City charging the defendants with conspiring to eliminate all competition —except as between wholesalers or jobbers—for the trade of all classes of retail dealers in jewelry and jewelry products. Upon consent a decree was entered enjoining the defendants from carrying out the conspiracy, January 30, 1914. *U. S. v. The New Departure Manufacturing Company et al.* (Coaster Brake Association). Petition was filed May 27, 1913, in the Federal District Court for the Western District of New York, alleging that the defendants had entered into a conspiracy and combination by means of a

license for the purpose of restraining and monopolizing the manufacture and sale of bicycle and motorcycle parts and coaster brakes. Upon consent, a decree against the defendants was entered at Rochester, New York, May 27, 1913. *U. S. v. Board of Trade of the City of Chicago et al.* Petition was filed February 11, 1913, in the Federal District Court for the Northern District of Illinois attacking Rule 33 of the Chicago Board of Trade, by virtue of which, it was alleged, the price of all corn, oats, wheat, and rye arriving in Chicago at times when the board of trade was not in session was arbitrarily determined. Upon the trial, the decision was in favour of the Government and a final decree was entered December 28, 1915, from which the defendants have appealed to the Supreme Court. *U. S. v. Krentler-Arnold Hinge Last Company et al.* Petition was filed February 7, 1913, in the Federal District Court for the Eastern District of Michigan, alleging the unlawful control by the defendant of the interstate trade and commerce in shoe and boot lasts. Upon consent, a decree was entered against the defendants at Detroit, Michigan, February 7, 1913. *U. S. v. Page et al.* Indictment was returned February 5, 1913, in the Federal District Court for the District of Oregon, charging fifteen individuals with unlawfully controlling, through the medium of the Produce Merchants Exchange of Portland, the purchase, distribution, and sale of approximately 90 per cent. of the produce, fruit, and vegetables shipped into the State of Oregon. The defendants pleaded guilty February 21, 1913, and fines aggregating $8,450 were imposed and collected.

U. S. v. Elgin Board of Trade et al. Petition was filed December 14, 1912, in the Federal District Court for the Northern District of Illinois, charging the defendants with combining and conspiring in the interest of a number of large centralizing concerns to restrain interstate commerce in butter and butter fat, and with arbitrarily fixing the price thereof throughout the United States. Upon consent, a decree against the defendants was entered April 27, 1914. *U. S. v. Philadelphia Jobbing Confectioners' Association et al.* Petition was filed December 13, 1912, in the Federal District Court for the Eastern District of Pennsylvania, charging the defendants with unlawfully interfering with interstate commerce in candies and confections. Upon consent, a decree was entered February 17, 1913. *U. S. v. Master Horseshoers' National Protective Association of America and others.* Petition was filed December 12, 1912, in the Federal District Court for the Eastern District of Michigan, charging the defendants with engaging in a combination and conspiring in restraint of trade and commerce in drilled horseshoes, adjustable calks, and rubber hoof pads. Demurrers were overruled April 4, 1914, and, upon consent, decrees against the defendants were entered in March, 1914, April, 1914, and January, 1916. *U. S. v. Associated Bill Posters and Distributors of the United States and Canada, et al.* Petition was filed August 3, 1912, in the Federal District Court for the Northern District of Illinois, charging the defendants with engaging in a combination and conspiracy to place unlawful restraints upon interstate and foreign trade and commerce in posters. Upon the trial, a

decision in favour of the Government was rendered March 14, 1916, and a decree to that effect was entered in July, 1916. The defendants have appealed to the Supreme Court. *U. S. v. The New Departure Manufacturing Company et al.* (Coaster Brake Association). Indictment was returned January 8, 1912, in the Federal District Court for the Western District of New York against six corporations and eighteen individuals, charging unlawful combination and conspiracy for the purpose of monopolizing the coaster brake business and fixing and maintaining prices for coaster brakes under the device of a license agreement. A plea in abatement to the indictment was overruled April 2, 1912, and a demurrer to the indictment was overruled March 12, 1913 (204 Fed. 107). Thereupon the defendants entered pleas of guilty and *nolo contendere*, and fines aggregating $81,500 were imposed in May, 1913. *U. S. v. Pacific Coast Plumbing Supply Association et al.* Petition was filed December 18, 1911, in the Federal Circuit Court for the Southern District of California, alleging unlawful restraints of trade and commerce in plumbing supplies on the Pacific Coast. A decree enjoining the defendants was entered January 6, 1912. *U. S. v. Willard G. Hollis et al.* Petition was filed October, 1911, in the Federal District Court for the District of Minnesota against the Lumber Secretaries' Bureau of Information, The Lumbermen Publishing Company, and certain individuals in the lumber trade. This case is now pending. *U. S. v. Colorado and Wyoming Lumber Dealers' Association and the Lumber Secretaries' Bureau of Information.* Petition was filed

September 25, 1911, in the Federal Circuit Court for the District of Colorado, seeking an injunction against the defendants for conspiring to restrain the trade in lumber and its products. This case is now pending. *U. S. v. Standard Wood Company, et al.* Petition was filed in September, 1911, in the Federal Circuit Court for the Southern District of New York against the members of the so-called Kindling Wood Association. On default, a decree was entered against the defendants March 11, 1912. *U. S. v. Edward E. Hartwick et al.* Petition was filed August 31, 1911, in the Federal Circuit Court for the Eastern District of Michigan against the members of the Michigan Retail Lumber Dealers' Association, the Scout Publishing Company, and The Lumber Secretaries' Bureau of Information for alleged restraint of trade in lumber. This case is still pending. *U. S. v. E. E. Jackson, Jr., et al.*, constituting the Wire Rope Association and *U. S. v. Wm. P. Palmer et al.*, constituting the Lead Encased Rubber Insulated Cable Association, and *U. S. v. Frank N. Philips et al.*, constituting the Telephone Cable Association, and *U. S. v. Phillip H. W. Smith et al.*, constituting the Underground Power Cable Association, and *U. S. v. Wm. P. Palmer et al.*, constituting the Horse Shoe Manufacturers' Association, and *U. S. v. F. W. Roebling et al.*, constituting the Fine Magnet Wire Association, and *U. S. v. Wm. P. Palmer et al.*, constituting the Rubber Covered Wire Association and *U. S. v. Wm. P. Palmer et al.*, constituting the Weatherproof and Magnet Wire Association and *U. S. v. Wm. P. Palmer et al.*, constituting the Bare Copper Wire Association. Indict-

ments in each of these cases were returned in the Federal District Court for the Southern District of New York June 29, 1911. The defendants entered pleas of *nolo contendere*, and fines aggregating approximately $128,700 were assessed. *U. S. v. Eastern States Retail Lumber Dealers' Association.* Petition was filed May 19, 1911, in the Federal Circuit Court for the Southern District of New York, charging the defendants with conspiring to restrain the trade through the instrumentality of black lists and trade agreements. Upon the trial the decision was in favour of the Government January 9, 1912 (201 Fed. 581) and a decree against the defendants was entered March 1, 1912. Upon appeal to the Supreme Court an opinion favourable to the Government was rendered June 22, 1914 (234 U. S. 600). *U. S. v. Wm. C. Geer et al.* (Paper Board Association). Indictment was returned April 28, 1911, in the Federal District Court for the Southern District of New York, alleging a combination and conspiracy in restraint of interstate commerce in paper board. A demurrer to the indictment was overruled May 9, 1913. The defendants pleaded *nolo contendere* February, 1915, and fines were imposed aggregating $16,000.

"Trade Association Investigation": *Farm Machinery Trade Associations.* Bureau of Corporations, Government Printing Office, March 15, 1915.

"Trading Stamp Case: *Forrest Photographic Company v. Hutchinson Grocery Company.* This was an action in the Texas District Court for Bexar County to recover upon a contract for trading stamps. From a judgment dismissing the case, the plaintiff

appealed to the Court of Civil Appeals which reversed the judgment March 4, 1908 (108 S. W. 768).

"Trading Stamp Case": *Merchants Legal Stamp Company v. Murphy.* This was an action in the Massachusetts Superior Court for Suffolk County to enforce a trading stamp contract. From a decree dismissing the bill, the plaintiff appealed to the Massachusetts Supreme Court, which affirmed the decree March 1, 1915 (220 Mass. 281).

"Turpentine Case": *U. S. v. American Naval Stores Co. et al.* Indictment was returned April 11, 1908, in the Federal Circuit Court for the Southern District of Georgia charging a combination in restraint of trade and commerce in the manufacture and sale of turpentine. A demurrer to the indictment was overruled April 17, 1909 (186 Fed. 592). A verdict of guilty was returned as to five individual defendants, and fines aggregating $17,500 were imposed and two defendants were sentenced to serve three months in jail in May, 1909 (see 172 Fed. 455). Appeal was taken to the Circuit Court of Appeals where the judgment was affirmed November 29, 1910 (186 Fed. 489). Certiorari was thereupon granted by the Supreme Court, and the judgment of the lower court was reversed on the ground of error in the judge's charge to the jury June 9, 1913, *Nash v. United States* (229 U. S. 373). The case was retried in the lower court, and a verdict of not guilty was returned June 1, 1914.

"Turpentine Case": *U. S. v. American Naval Stores Company et al.* Petition was filed January 8, 1912, in the Federal District Court for the Southern

District of Georgia, alleging unlawful combination and conspiracy in restraint of interstate and foreign commerce in turpentine and resin. A demurrer was overruled January 2, 1913. The defendant suspended business on account of financial difficulties in March, 1913, and since then no further action has been taken.

"Underwear Case": *Atlas Underwear Company v. Cooper Underwear Company.* This was a suit in equity in the Federal District Court of Wisconsin for the Southern District to enjoin the circulation by the defendant of threats of infringement suits. The court granted an injunction December 3, 1913 (210 Fed. 347).

"Wall Paper Case": *Continental Wall Paper Company v. Voight & Sons Company.* This was an action, in the Federal Circuit Court for the Southern District of Ohio to recover a balance due on account of wall paper sold and delivered to the defendants. Upon demurrer, judgment was entered for the defendants dismissing the petition. Upon appeal to the Circuit Court of Appeals, judgment was affirmed January 5, 1906 (148 Fed. 939). Upon appeal to the Supreme Court judgment was affirmed February 1, 1909 (212 U. S. 227).

"Watch Case Suit": *U. S. v. Keystone Watch Case Company et al.* Petition was filed December 20, 1911, in the Federal Circuit Court for the Eastern District of Pennsylvania, alleging unlawful contracts, combinations and conspiracies to monopolize trade in filled watch cases and watches, and praying for a decree ordering the dissolution of the Company and enjoining the defendants from further committing the

acts complained of. A decision in part favourable and in part adverse to the Government's contentions was handed down January 2, 1915 (218 Fed. 502). A demurrer was entered in conformity therewith, from which both the Government and the defendants have appealed to the Supreme Court where the appeal is now pending.

"Wholesale Grocers' Case": *U. S. v. Southern Wholesale Grocers' Association.* Petition was filed June 9, 1910, in the Federal Circuit Court for the Northern District of Alabama against an alleged combination to regulate prices and control marketing of groceries. Upon consent, a decree was entered perpetually enjoining the association, its officers, and members, from doing any and all of the acts complained of October 17, 1911 (see 207 Fed. 444). On February 10, 1913, petition for rule to show cause why an attachment should not issue for contempt of court for alleged violation of the terms of this decree was filed in the Federal District Court for the Northern District of Alabama. The association and three individual members were adjudged guilty of contempt of court, and on August 4, 1913, fines aggregating $5,500 were imposed.

Wherever any of the authorities above mentioned have been officially reported among the decisions of the Supreme Court of the United States, or the lower Federal courts, or the various State courts, the reference has been given. Many of the most recent and significant of these authori-

ties, however, are either bills of complaint, charges to juries, decrees, or other unpublished proceedings that are not readily accessible anywhere except through the special courtesy of either Government officials or participating counsel. For much of this unpublished material, I am indebted to the Attorney-General of the United States and to various United States attorneys and officials of the Department of Justice.

Some of the more recent books, dealing with the topics of the preceding chapters and with collateral topics, and with various economic aspects of these topics, have, in response to numerous requests, been enumerated below. No attempt has been made to make the list complete, nor to include the wealth of valuable material that has appeared in numberless newspapers, magazines, and Government publications; and only such books as are readily accessible to the general reader are mentioned:

Trust Laws and Unfair Competition, by Joseph E. Davies, Commissioner of Corporations, Washington, 1915.

Awakening of Business, by Edward N. Hurley, New York, 1916.

The Anti-trust Act and the Supreme Court by William H. Taft, New York, 1914.

Manual of the Sherman Law, by Everett N. Curtis, New York, 1915.

A Treatise on the Sherman Anti-Trust Act, by William W. Thornton, Cincinnati, 1913.

History of the Sherman Law, by Albert H. Walker, New York, 1910.

The Federal Trade Commission, by John M. Harlan and Lewis W. McCandless, Chicago, 1916.

A Manual of the Federal Trade Commission, by Richard S. Harvey and Ernest W. Bradford, Washington, 1916.

The Law of Unfair Competition (revised edition), by Harry D. Nims, New York, 1917.

The Law of Trademarks, Tradenames, and Unfair Competition (third edition), by James L. Hopkins, Cincinnati, 1916.

Goodwill, Trademarks, and Unfair Trading, by Edward S. Rogers, Chicago, 1914.

Industrial Combinations and Trusts, by William S. Stevens, New York, 1913.

Trusts, Pools and Corporations (revised edition), by William Z. Ripley, Boston, 1916.

Trusts and Competition, by John F. Crowell, Chicago, 1915.

Business Organization and Combination, by Lewis H. Haney, New York, 1913.

The Trust Problem, by E. Dana Durand, Cambridge, 1915.

The Control of Trusts (revised edition), by John B. Clark, and John Maurice Clark, New York, 1912.

Concentration and Control: A Solution of the Trust Problem in the United States, by Charles R. Van Hise, New York, 1912.

Control of the Market: A Legal Solution of the Trust Problem, by Bruce Wyman, New York, 1911.

The Trust Problem, by Jeremiah W. Jenks, New York, 1900.

Monopolies and Trusts, by Richard T. Ely, New York, 1910.

Trusts of Today, by Gilbert H. Montague, New York, 1904.

Corporations and the State, by Theodore E. Burton, New York, 1911.

The New Competition (revised edition), by Arthur J. Eddy, Chicago, 1915.

Big Business and Government, by Charles N. Fay, New York, 1912.

Trade Morals, by Edward D. Page, New Haven, 1914.

Honest Business, by Amos K. Fisk, New York, 1914.

Inventors and Money Makers, by F. W. Taussig, New York, 1915.

An Approach to Business Problems, by A. W. Shaw, Cambridge, 1916.

Advertising as a Business Force, by Paul T. Cherington, New York, 1913.

Advertising—Selling the Consumer, by John L. Mahin, New York, 1914.

The New Business, by Harry Tipper, New York, 1914.

The First Advertising Book, by Paul T. Cherington, New York, 1916.

Selling Forces, by Curtis Publishing Company, Philadelphia, 1913.

Retail Selling, by James W. Fisk, New York, 1916.

Materials for the Study of Elementary Economics, by Leon C. Marshall, Chester W. Wright, and James A. Field, Chicago, 1913.

Current Economic Problems, by Walter H. Hamilton, Chicago, 1915.

Industrial Competition and Combination, collated by the American Academy of Political and Social Science, Philadelphia, 1912.

National Industries and the Federal Government, collated by the American Academy of Political and Social Science, Philadelphia, 1916.

Foreign experience with trust problems in general will be found interesting:

Co-operation in American Export Trade, by the Federal Trade Commission, Washington, 1916.

The Trust Movement in British Industry, by H. W. Macrosty, London, 1907.

Monopoly and Competition, by Hermann Levy, London, 1911.

The Prevention and Control of Monopolies, by W. Jethro Brown, New York, 1915.

Monopolistic Combinations in the German Coal Industry, by Francis Walker, New York, 1904.

Monarchical Socialism in Germany, by Elmer Roberts, New York, 1913.

Several books dealing primarily with modes of organizing and financing business enterprises are helpful upon some of the questions raised in the preceding chapters:

The Administration of Industrial Enterprises, by Edward D. Jones, New York, 1916.

The Law of Promoters, by Manfred W. Ehrich, Albany, 1916.

The Law of Unincorporated Associations, by Sydney R. Wrightington, Boston, 1916.

Corporate Promotions and Reorganizations, by Arthur S. Dewing, Cambridge, 1914.

Voting Trusts, by Harry A. Cushing, New York, 1915.

Corporation Finance (complete edition), Hastings Lyon, Boston, 1916.

Corporation Finance (revised edition), by Edward S. Mead, New York, 1915.

How to Finance a Business, by A. W. Shaw Company, Chicago, 1912.

Materials of Corporation Finance, by Charles W. Gerstenberg, New York, 1915.

The diversity of the books above enumerated shows how far afield the student of this subject must go for much of his material. For the most recent developments in the economics of merchandising, first place should always be given to such magazines as *System*, *Printer's Ink*, and *Advertising and Selling*, which have long been esteemed by practical merchandising experts, and more recently have begun to be appreciated by economists, lawyers and general students of modern business competition.

Shrewd observers, who detect in governmental regulation of business many resemblances to the Government regulation of railroads and other public utilities, may find the following books suggestive:

The Law of Interstate Commerce, by Frederick N. Judson, Chicago, 1916.

An Act to Regulate Commerce, by Herbert B. Fuller, Washington, 1915.

Railroad Rate Regulation, by Joseph H. Beale and Bruce Wyman, New York, 1915.

The Commodities Clause, by Thomas L. Kibler, Washington, 1916.

Railroad Reorganization, by Stuart Daggett, Cambridge, 1908.

Regulation of Railroads and Public Utilities in Wisconsin, by Fred L. Holmes, New York, 1915.

Justice and the Modern Law, by Everett V. Abbott, Boston, 1913.

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